THE

Madras Law Journal Reports.

II] JULY [1945

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kangayam V. V. R. Bank by managing partner and agent Valliappa Chettiar .. *Appellant**

v.

Karuppa Goundan and others .. *Respondents.*

Mortgage—Co-sharer creating two mortgages over his share in favour of different persons—Separate suits by each mortgagee without impleading the other—Decrees—Each mortgagee purchasing the share in execution of his own decree and obtaining symbolical possession—Suit for partition by second mortgagee—Relief that could be given.

A co-sharer created two mortgages over his share in certain property in favour of two different persons. The second mortgagee filed a suit on his mortgage without impleading the prior mortgagee and in execution of the decree obtained thereon bought his mortgagor's share subject to the first mortgage and also obtained symbolical possession. The first mortgagee had also in the meanwhile filed a suit on his mortgage without impleading the second mortgagee and obtained a decree. In execution of the decree he also bought his mortgagor's share and also obtained symbolical possession. In a suit by the second mortgagee for partition,

Held, that the case was governed by the decision in *Ananthanarayana Iyer* v. *Sivaramakrishna Iyer*, (1943) 1 M.L.J. 100 and in the circumstances the suit should not be dismissed, but a decree for partition should be given to the plaintiff conditional on his redeeming the first mortgage created on the mortgagor's share.

Appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in A. S. No. 66 of 1943 preferred against the decree of the Court of the District Munsiff, Dharapuram, in O.S. No. 502 of 1941.

C. D. Venkataraman for Appellant.

M. R. Narayanaswami for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal is governed by the decision of this Court in *Ananthanarayana Iyer* v. *Sivaramakrishna Iyer*[1]. The appellant is the plaintiff in the suit. On the 4th July, 1912, one Pattai Goundan mortgaged his one-fourth share in the property in suit to the first defendant and on the 26th September, 1912, he created a second mortgage in favour of the plaintiff. In O. S. No. 802 of 1924, on the file of the District Munsiff's Court of Dharapuram the plaintiff sued to enforce his second mortgage. He did not, however, implead the first defendant as the mortgagee. He obtained a decree and at the Court sale held in execution on the 13th August, 1929, he bought the mortgagor's one-fourth share. His purchase was, of course, subject to the first mortgage. On the 12th October, 1929, he obtained symbolical possession.

In 1926, the first defendant filed a suit (O. S. No. 568 of 1926) to enforce his mortgage without impleading the plaintiff. He obtained a decree. On the 11th

* S. A. No. 504 of 1944. 7th February, 1945.

1. (1943) 1 M.L.J. 100.

November, 1930, he purchased the mortgagor's share of the property at the sale held in execution and on the 20th October, 1932, he obtained symbolical possession. Sixteen years before, namely, on the 27th June, 1916, the defendant had purchased the one-fourth interest of another co-sharer in the property. After the Court sale of the 11th November, 1930, the first defendant obtained possession of an undivided half share of the property. The present suit was instituted by the second mortgagee for partition. He made all the co-sharers defendants. The District Munsiff decreed the suit, but on appeal his decision was overruled by the Subordinate Judge who dismissed the suit. The plaintiff has now appealed to this Court.

The appellant says that the Subordinate Judge was wrong in not relying on the judgment of the Full Bench of this Court which decided *Nagendran Chettiar* v. *Lakshmi Ammal*[1]. The Subordinate Judge refused to follow this judgment, as he considered it to be inapplicable. In that case it was held that where there is a first and a second mortgage in favour of different persons and each mortgagee files a separate suit to realise the amount due on his mortgage without impleading the other mortgagee and in execution each buys the mortgagor's interest, in a suit for possession *simpliciter* the mortgagee who bought first is entitled to possession. This present suit is not a suit for possession *simpliciter*; it is a suit for partition and therefore *Nagendran Chettiar* v. *Lakshmi Ammal*[1] does not apply. As we have indicated, the case falls entirely within *Ananthanarayana Iyer* v. *Sivaramakrishna Iyer*[2].

In these circumstances, the suit should not be dismissed, but a decree for partition should be given to the plaintiff conditional on his redeeming the first mortgage created on Pattai Goundan's share. The appellant and the respondent, having appreciated the position, are agreeable to such a decree being passed by this Court. Accordingly we hold that the appellant is entitled to a decree for partition and the recovery of a one-fourth share in the property in suit conditional on his paying into Court within six weeks of the date on which it is ascertained the sum due to the first defendant as the first mortgagee of Pattai Goundan's one-fourth share. In other words, the plaintiff will be given an opportunity of redeeming the first defendant within the stipulated period.

The suit will have to be remanded to the trial Court for the ascertainment of the amount due to the first mortgagee and the passing of a decree for partition and delivery to the plaintiff of the one-fourth share, subject to his depositing the sum into Court within the time allowed. The amount payable on redemption will, of course, include the interest on the mortgage money but the first defendant will have to give credit for the income of the one-fourth share from the date on which he went into possession. If he fails to deposit the amount within the due date, the suit will stand dismissed.

We will make no order as to costs in this Court; but the costs already awarded to the first defendant below will stand. The costs of the further hearing before the District Munsiff will lie in his discretion.

V.S. *Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

K. Ramasubramania Mudaliar .. *Appellant**

v.

The Salem Urban Co-operative Society, Limited, represented by its Secretary and another .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), section 51—Mortgage by member to Society—Proceedings for enforcing—Alienee from mortgagor is a proper party to—Power of Registrar or arbitrator appointed by him to pass a decree for sale of the property—Alienee who was party to proceedings—Cannot question the decree in execution or by separate suit—Bye law of Society providing for execution by Civil Court only—Act providing for execution through department—Effect.

The Registrar or an arbitrator appointed by him under section 51 of the Madras Co-operative Societies Act has the power to pass a decree against the property mortgaged to the Society so as to

1. (1933) 65 M.L.J. 108: I.L.R. 56 Mad. 846 (F.B.). 2. (1943) 1 M.L.J. 100.

* S. A. No. 984 of 1944 and A. A. A. O. No. 154 of 1944. 13th March, 1945.

bind a subsequent alienee who was made a party to the proceedings. The power is not limited to the passing of an ordinary money decree. Such an alienee is a proper party to the proceedings and the question as to the mortgage liability as between him and the Society is one touching the business of the Society. An alienee properly made a party to the proceedings cannot attack the decree either in the execution department or by way of a regular suit. It is only a stranger who was not a party that can file a separate suit and even then the decree can be attacked only on grounds of fraud or collusion or the like.

Though the bye-laws of the Society, providing for execution only through a Civil Court, had not been altered after the passing of Madras Act VI of 1932 providing for execution of awards by the department itself, the bye-law cannot prevail, and execution can proceed through the department itself.

Appeal against the decree of the Court of the Subordinate Judge, Salem, dated 8th January, 1944, and passed in A. S. No. 61 of 1943, preferred against the decree of the Court of the District Munsiff, Salem, in O.S. No. 358 of 1940, etc.

D. Ramaswami Aiyangar and *P. S. Srinivasa Desikan* for Appellant.

B. Sitarama Rao and *T. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this second appeal is whether the Registrar or an arbitrator appointed by him under section 51 of the Madras Co-operative Societies Act (VI of 1932) has the power to pass a decree against the property mortgaged to the Society so as to bind a subsequent alienee who was made a party to the arbitration proceedings. The plaintiff is the purchaser from one David Dorairaja of a house which had been mortgaged by the vendor to the defendant, the Salem Urban Co-operative Society, Ltd., for a sum of Rs. 1,500 taken as a loan on the 7th February, 1933, on a mortgage of the suit house. Having purchased the property on the 20th June, 1934, subject to the mortgage in favour of the Society, the plaintiff sent a cheque for a certain amount but the defendant-society refused to accept it claiming a larger amount. Thereafter the respondent-society filed claim No. 170 of 1935, before the Sub-Deputy Registrar of Co-operative Societies impleading both the original borrower David Dorairaja and also the appellant, the subsequent vendee. The Sub-Deputy Registrar gave a decision upholding the claim of the present appellant that he was bound only to pay Rs. 1,433 instead of the larger sum claimed by the Society. Unfortunately for reasons best known to himself, the appellant who was also a party to the proceedings before the Registrar did not pay the sum adjudged even though at an earlier stage he had sent a cheque for that sum. Thereupon the respondent-society applied for execution of the decision or decree which is provided for under section 57-A and rule XXII, clause 7 of the rules made under the Madras Co-operative Societies Act and the property was purchased by the respondent. The present suit is filed to establish the plaintiff's title and for an injunction restraining the respondent from dispossessing the appellant. Both the lower Courts dismissed the suit and hence this second appeal.

The chief argument of Mr. Ramaswami Aiyangar, the learned advocate for appellant, is that under the Act, the Registrar or an arbitrator has no power to give a decision or to pass an award directing sale of the mortgaged property and much less to pass such a decree so as to bind a subsequent mortgagee or a subsequent alienee. The decretal order, as we may call it, runs thus :

"That the defendants 1 and 2 do pay plaintiff Rs. 1,433-5-9 without interest. In default the mortgaged property hereunder specified or a sufficient part thereof shall be sold and the proceeds applied in payment of the amount due to the plaintiff, namely, Rs. 1,433-5-9. If the sale proceeds be found insufficient the plaintiff may recover the balance from defendant 1 personally or from his other properties or in both these ways."

The material portion of section 51, clause (1) runs thus :

"If any dispute touching the business of a registered society . . . . . . arises—

* * * * *

(*b*) between a member, past member or person claiming through a member, past member or deceased member and the society, ... such dispute shall be referred to the Registrar for decision.

Explanation.—A claim by a registered society for any debt or demand due to it from a member, past member or the nominee, heir or legal representative of a deceased member, whether such debt or demand be admitted or not, is a dispute touching the business of the society within the meaning of this sub-section."

This explanation was added in the Madras Act so as to remove any doubt on the question whether a debt due by a member is a dispute touching the business of a registered society. Even prior to this explanation, the Courts held under the Imperial Act, II of 1912, that a claim by the Society to recover a debt due by a member is a dispute under the Act. There cannot possibly be any doubt that the main business of these registered societies is to advance loans to the members and recover them; and if the loan is not returned and a claim has to be made, it is obviously a dispute touching the business of the Society.

Under this definition a dispute between a person claiming through a member on the one side and the Society on the other is a dispute which has to be referred to the Registrar for decision. Under clause (2) of the same section, the Registrar may either decide the dispute himself and among other things he can also refer it for disposal to an arbitrator or arbitrators. In the present case, the Registrar decided on the merits in favour of the appellant who took part in the proceedings, contested the claim of the Society and succeeded in establishing that the amount which he sent already was the proper sum payable to the Society. I do not find any limitation on the power of the Registrar or of the arbitrator limiting his power to an ordinary money decree. Mr. Ramaswami Aiyangar says that only a money decree is contemplated by the Act and not a decree against the property mortgaged to the Society. If this interpretation is accepted, the vast majority of the loans granted by such societies cannot be recovered by the simple method provided under the Act. Almost invariably a security in the shape of a mortgage is taken by the Society and on the interpretation suggested, the Society will have to go to the Civil Court for getting the amount by sale of the property. Unless there is a distinct provision limiting the authority of the arbitrator or the Registrar, I am of opinion that this argument cannot be accepted. Further section 57-A which is a new section introduced by Madras Act V of 1935 puts the position beyond all possible doubt. The material portion of that section runs thus:

> "The Registrar may recover any amount due under a decree or order of a Civil Court, a decision or an award of the Registrar or arbitrator . . . . together with the interest, if any, due on such amount or sum and the costs of process by the attachment and sale *or by the sale without attachment* of the property of the person against whom such decree, decision, award or order has been obtained or passed."

Rule 22, clause 7 also provides as amended that—

> "In the attachment and sale (or sale without attachment) of immovable property the following rules shall be observed :—

The section and the rules make it clear that a sale without attachment is distinctly provided for by the Act. If it is a money decree the property should be attached and then alone the property can be sold. Mr. Ramaswami Aiyangar urges that even in a case of a money decree, it is not illegal to sell the property without attachment. But we are not concerned with the question whether such a sale without attachment is absolutely illegal and void, but whether there ought not to be an attachment before the property of the judgment-debtor is sold. There cannot possibly be any doubt about it. The property must first be attached and then alone it ought to be brought to sale. Whether a sale held without an attachment is absolutely void or not is not the question that arises here. The provision for both cases—cases of attachment and sale and cases of sale without an attachment—show that the latter portion provides for cases in which there need not be an attachment. That certainly includes decrees for sale of the property such as the one that we have in this case.

The next point urged is that the appellant was not a proper party and could not be a party to the proceedings under section 51 or under the other sections of the Act. This is by no means clear. Section 51, clause (*b*), as already set out, includes a person who claims under a member. The object of the Act seems to be to provide not merely for proceeding against the member but also against a person who claims through him. This objection, it may be stated, was not taken before the Registrar. The appellant appeared in the proceedings, contested it and succeeded in reducing the sum claimed by the Society. It seems to me very doubtful whether the principle that submission to jurisdiction renders the decree binding on the party so sub-

mitting does not apply to this case. But I prefer to put it on a higher ground, namely, that section 51 empowers the joinder of such a person in a claim to recover the amount.

I shall now refer to a few of the decisions on these points. Before Madras Act VI of 1932 was passed, the Co-operative Societies were governed by the Imperial Act II of 1912, the Co-operative Societies Act. The relevant portion of section 43, clause (2) (1) runs thus :

"The Provincial Government may make rules to carry out the purposes of this Act. In particular and without prejudice to the generality of the foregoing power, such rules may provide that any dispute touching the business of a society between members or past members of the society or persons claiming through a member or past member or persons so claiming and the committee or any officer shall be referred to the Registrar for decision or, if he so directs, to arbitration, and prescribe the mode of appointing an arbitrator or arbitrators and the procedure to be followed in proceedings before the Registrar or such arbitrator or arbitrators, and the enforcement of the decisions of the Registrar or the awards of the arbitrators."

Under this section the question arose whether a dispute regarding an amount due by a member to the Society came within section 43, clause 2 (1). In *Dacca Co-operative Industrial Union, Ltd.* v. *Dacca Co-operative Sankha Silpa Samiti, Ltd.*,[1] it was held by Mitter and Biswas, JJ., that the principal business of a Co-operative Society being to finance its members, a dispute concerning the financial obligations of its members to the Society is a dispute concerning the business of the Society. This provision is in the Madras Act enacted in section 51. Reliance is placed on the wording of the explanation to section 51 which has already been set out and it is urged that the explanation shows that it is only :

"a claim by a registered society for any debt due to it from a member, past member or the nominee, heir, or legal representative of a deceased member whether such debt or demand be admitted or not"

which is a dispute touching the business of the Society within the meaning of the sub-section. The argument is that a claim by a registered society as against a person who claims through a member or past member is not within the explanation. As decided on the analogous wording in section 43, clause 2 (1) of the Imperial Act (II of 1912) even without the explanation, a debt due to the Society by a member or a person claiming through a member is a dispute touching the business of the registered society. In the body of section 51 of the Madras Act express provision is made that a dispute between a member, past member or person claiming through a member regarding a dispute should be referred to the Registrar. The explanation which is intended only to clear a doubt cannot operate to control the operative portion of the section. I hold therefore that the dispute between the appellant who was a person claiming through a member and the Society comes within section 51, clause (*b*). This also disposes of the question that the Registrar or the arbitrator has no power to proceed against a person who is not a member. Section 51, clause (*b*) when using the expression " or persons claiming through a member, past member" does not obviously restrict the operation of that phrase to a case of a member who claims through another member. If he is himself a member he comes under the first provision of section 51 (*b*). The expression " person claiming through a member or past member " must obviously refer to a person who is not himself a member. The argument that the second defendant was not a proper party to the proceedings under section 51 must therefore be rejected. Mr. Ramaswami Aiyangar referred me to *Tay Gyi* v. *Maung Yan*[2], in support of his contention that a decree for the sale of the property cannot be passed by the arbitrators. The decision relied on is that of a single judge. There is no doubt a statement that—

" It should not be necessary to point out that a co-operative arbitrator has no power to pass mortgage decrees."

In a later decision of the same Court in *Yatha Co-operative Society* v. *Maung Po Mya*,[3] Mosley, J., had to deal with a case where an arbitrator gave an award to the effect that the debtors were to pay a certain sum within three days failing which the mortgaged property was to be sold and the sale proceeds applied towards the debt.

1. I.L.R. (1938) 2 Cal. 103. 2. A.I.R. 1933 Rang. 81. 3. (1935) I.L.R. 13 Rang. 343

The award under rule 15, clause (4) of the Burma Co-operative Societies Rules, 1931, was transmitted to the Civil Court for execution. There is a similar provision in the Madras Act that the decision or order of the Registrar or the award of the arbitrator may be enforced either by Civil Courts on its being transferred to that Court or by the Registrar himself or by a person subordinate to him and empowered by the Registrar in that behalf. In the Rangoon case an application was made to the Civil Court for execution. A money decree had been obtained against the same debtors in the Civil Court and the property had been sold in execution of that decree and purchased by the decree-holder himself. The Society applied that they should be allowed to bring the property to sale in execution of the award. That was refused by the executing Court. On appeal the Subordinate Judge held following the earlier decision in *Tav Gyi* v. *Maung Yan*[1] that the arbitrators had no power to pass mortgage decrees. The matter was taken to the High Court. Mosely, J., referring to the above decision, said this :

"This judgment was misconstrued, the emphasis was on the word 'decree.' What was meant was that the arbitrator could only pass an award, but that award can be executed as if it were a decree. It is not an order which cannot legally be passed and of which execution should be refused, as in the case quoted *Maung Ba Lat* v. *Liquidator, Kemmendine Thathanahita Co-operative Society*[2] I see no difficulty in the position created. The order to be executed as if it were a mortgage decree does not bind other persons claiming to have a mortgage of the same property any more than a mortgage decree of the Court would bind them, but the order is conclusive and binding on the property until it is attacked by way of a regular suit. A stranger to the proceedings by the society cannot dispute the order in execution but must do so by way of a suit. If he sues he can attack the order on exactly the same grounds as if it were a mortgage decree by a Court, that is to say, on the grounds of fraud or collusion, or that the mortgage was not properly registered and so on."

I agree with the later decision of Mosley, J., that a decree for sale of the property or what we call a mortgage decree can be passed by the arbitrator under the Act. The appellant having been properly made a party cannot attack it either in the execution department or by way of a regular suit. It is only a stranger who was not a party that can file a separate suit and even then the decree can be attacked only on grounds of fraud or collusion or the like.

The next point urged is that under the bye-laws of the respondent-society execution could be had only through a Civil Court. These bye-laws were admittedly framed at a time when execution through the department was not provided as one of the modes of executing the award of an arbitrator or the decision of the Registrar. After the Madras Act (VI of 1932) was passed, this bye-law has not been altered and has been allowed to stand as it was. The argument advanced by Mr. Ramaswami Aiyangar is that the execution contrary to the bye-law is invalid. Madras Act VI of 1932 distinctly provides, as already pointed out, for execution by the department itself, *i.e.*, by the Registrar or by a person subordinate to him and empowered by the Registrar in that behalf. The rules also provide for such execution by the Registrar or by a subordinate. If there is a conflict between a provision contained in the Act itself or in the rules and a bye-law, it is undisputed that the bye-law cannot prevail. It is urged that a bye-law can limit the powers granted by the Act or by the rules. I do not think there is any such limitation in this case. The bye-law was passed at a time when the law then in force did not provide for execution through the department. There is no express limitation in the bye-law relied upon that resort to execution through the department should not be had. I am, therefore, of opinion that the execution was properly conducted through the department and that this objection must also fail.

The second appeal fails and is dismissed with costs.

No leave.

A. A. A. O. No. 154 OF 1944.—It is conceded that the decision in the present appeal governs this case. The Civil Miscellaneous Second Appeal is accordingly dismissed. No costs. No leave.

K.S. — *Appeals dismissed.*

---

1. A.I.R. 1933 Rang. 81.
2. (1933) I.L.R. 11 Rang. 125.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AYYAR.

Manicka Nadar .. *Appellant**

v.

Arumuga Sundara Sathia Gnana Pandara Sannadhi Avergal .. *Respondent.*

Mortgage—Usufructuary mortgage—Period fixed for redemption—Failure of mortgagee to advance the full amount of mortgage money—Does not entitle mortgagor to sue for redemption before expiry of period fixed for redemption.

In respect of a usufructuary mortgage the period fixed for redemption must govern the rights and relations of the parties in the absence of a contract to the contrary. If one of the parties does not conform to or fulfil the requirements or the obligations imposed on him the other party may have a remedy in damages against him. The fact that the mortgagee has failed to advance the full mortgage amount does not entitle the mortgagor to sue for redemption before the expiry of the period fixed in the conveyance.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin dated 28th December, 1942, and passed in A.S. No. 102 of 1940, preferred against the decree of the Court of the District Munsif of Tuticorin, dated 8th August, 1940, and made in O.S. No. 285 of 1939.

N. S. Sundaram for Appellant.

A. Swaminatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff, the head of a math, created a usufructuary mortgage over certain immovable properties on 5th May, 1938, under Ex. I for a sum of Rs. 625 in favour of the defendant, appellant in this second appeal. It is provided in the mortgage that the mortgagee should enjoy the mortgaged property for a period of eleven years from the date of mortgage, himself paying the Government kist. Then comes the relevant clause:

"After the expiry of the period I shall pay the amount and have the schedule property redeemed".

The consideration of Rs. 625 was made up of three items, a sum of Rs. 214-14-11 due to one Mayakootha Pillai, a sum of Rs. 310-1-1 due to one Saminatha Desikar, and a sum of Rs. 100 paid in cash. The mortgagee was directed to pay the sums due to Mayakootha Pillai and Saminatha Desikar but he did not pay the amounts, and the mortgagor discharged the debts in April and May, 1939, owing to pressure from the creditors. The plaintiff brought this suit for redemption on 23rd November, 1939, setting out these facts alleging that the properties would yield an annual income of Rs. 75 and that as against the sum of Rs. 100 which alone was advanced by the mortgagee under the deed of mortgage what would be due and payable to him after debiting with the income of Rs. 75 was Rs. 31 only, Rs. 6 being taken as the rate of interest agreed upon between the parties. This suit was resisted by the mortgagee as premature because it was brought before the expiry of the eleven years' period fixed in the deed. He raised the contention that though he was always ready and willing to pay the creditors, they demanded higher amounts and that consequently he had to go before the Debt Conciliation Board with unsuccessful results, as the plaintiff would not co-operate with him. These pleas have been overruled by both the lower courts. On the question whether the suit was premature, they came to a conclusion in favour of the plaintiff and allowed redemption even before the period fixed in the deed of mortgage following an equitable rule enunciated in *Chhotku Rai* v. *Baldeo Sukul*[1], and adopted in *Narasimha Rao Pantulu* v. *Seshayya.*[2] This conclusion is challenged in this second appeal by the defendant.

---

*S.A. No. 836 of 1943. 5th March, 1944.

1. (1912) I.L.R. 34 All. 659.
2. (1924) 48 M.L.J. 363.

Chhotku Rai v. *Baldeo Sukul*[1] is no doubt a case exactly like the present one and redemption was allowed before the period fixed on the ground that it was equitable to do so as the defendants did not perform what was a most essential part of the contract so far as they were concerned. But in the same volume in *Rashik Lal* v. *Ramnarain*[2] is a decision of another Bench where the distinction between a contract and a conveyance is pointed out and it is laid down that the mere fact that part of the mortgage money has not been paid does not render the mortgage invalid nor does it entitle the mortgagor to rescind it at his option. They dissent from a Full Bench decision of the Lahore High Court where it was held that failure to pay a prior encumbrancer avoids the mortgage and destroys the mortgagee's lien and right to possession even on a subsequent tender of the unpaid consideration it being immaterial whether the non-payment has or has not caused inconvenience or loss to the mortgagor. *Chamier, J.*, points out that there is no distinction in principle between the case of a sale and that of a mortgage and that interest in the mortgaged property is transferred even where the mortgagee refuses to advance part of the money agreed to be advanced. He was however inclined to hold that the Court was not bound in every case to enforce the mortgage according to the letter where the whole of the mortgage money has not been advanced and he observed:

> "where the mortgagee sues for possession, he may, I think, be required to pay the balance of the mortgage money before he takes out execution of his decree, and there may be other cases in which he may properly be put upon terms."

The decision in *Chhotku Rai* v. *Baldeo Sukul*[1] was dissented from in *Kandasami Pillai* v. *Ramasami Mannadi*[3]. This was a case of a lease where the lessees sued for possession of a demised property without discharging a mortgage debt on the property which they agreed to discharge and in consequence of which failure on their part it became necessary for the lessor to execute a usufructuary mortgage to third parties. Wallis, C.J., and Kumaraswami Sastri, J., differed, the former holding that the lessees were entitled to recover possession and the latter taking the view that as they failed to discharge the debts which they had undertaken to discharge, they were not entitled to sue for possession. As the suit was for possession the learned Chief Justice imposed a condition on the plaintiffs that they will not get possession until they repaid to the subsequent mortgagees what they had advanced to the lessor for payment to the prior mortgagees. Speaking of the subsequent mortgagees, he says that:

> "they are entitled to be sub-mortgaged to the rights of the prior mortgagees whom they had paid off and to retain possession until they have been repaid what, but for their intervention, would have become payable to the original mortgagees".

Owing to this difference of opinion, the case came up before a Bench of three Judges and they upheld the view of Wallis, C.J., *Chhotku Rai* v. *Baldeo Sukul*[1] and *Subba Rao* v. *Devu Shetti*[4], which was referred to with disapproval in the earlier Allahabad case were considered by the Bench and dissented from. With reference to the former case, Abdur Rahim, J., says:

> "They cite no authority and do not enunciate any general and well-recognised principle of equity by which the case could be said to be governed. With all respect to the learned Judges, it is not open to us to proceed on some sort of vague equitable grounds, especially in a case like this, where the plaintiffs are seeking a remedy in law."

As regards *Subbarao* v. *Devu Shetti*[4], the decision was put aside as obscure in the absence of the necessary facts. Courts-Trotter, J., observed as follows:

> "All I can say is that I do not understand it as reported, nor do I gather upon what principle the learned Judges proceeded. With regard to the case in *Subbarao* v. *Devu Shetti*[4], I have no hesitation in saying that unless it can be explained by an omission in the report as to the existence of an express power of cancellation, it must be regarded as contrary to the trend of authority".

---

1. (1912) I.L.R. 34 All. 659.
2. (1912) I.L.R. 34 All. 273.
3. (1918) 36 M.L.J. 313: I.L.R. 42 Mad. 203.
4. (1894) I.L.R. 18 Mad. 126.

If the correct principle has been laid down in *Tatia* v. *Babaji*[1], *Rashik Lal* v. *Ramnarain*[2], and *Kandasami Pillai* v. *Ramasami Mannadi*[3], we must consider *Subba Rao* v. *Devu Shetti*[4], and *Chhotku Rai* v. *Baldeo Sukul*[5], as wrong decisions, not binding on us.

The lower Courts have however followed *Narasimharao Pantulu* v. *Seshayya*[6], as a decision later in date to *Kandasami Pillai* v. *Ramasami Mannadi*[3], and it has to be presently examined. Mr. A. Swaminatha Aiyar, the learned Advocate for the respondent, pointed out that the view taken by Devadoss, J., in that case was upheld in Letters Patent Appeal by Venkatasubba Rao and Reilly, JJ., in *Immani Seshayya* v. *Dronamraju Lakshminarasa Rao Pantulu*[7], and he contended on these authorities that a suit for redemption instituted before the expiry of the period fixed for redemption in a deed of usufructuary mortgage will lie when the mortgagee does not advance the full amount of consideration but pays only less and the amount lent can be said to have become discharged from his enjoyment of the usufruct of the property. He argued that it would be very oppressive to the mortgagor if in a case like the present where the sum advanced was only Rs. 100, the mortgagee could still take advantage of the term in the deed that he should remain in possession for the full period of eleven years, when long before that date, the debt would become discharged. I agree that there is hardship but the question is whether considerations of hardship entitle us to invent or create equitable rules or principles to circumvent or overcome such hardship. In this connection, attention may be drawn to *Yella Krishnamma* v. *Kotipalli Mali*[8], where referring to *Velayudhan Chetty* v. *Govindaswami Naicker*[9], the learned Judges say:

> "Can courts give equitable relief to mitigate or suspend the consequences laid down by a statute; and they came to the conclusion that such a proposition as that the plain words of the statute could be whittled away by the application of the so-called equitable doctrines, was an absolutely untenable one and they expressed their dissent from the contrary decision in *Baijanath Singh* v. *Paltu*, (1908) I.L.R. 30 All. 125".

In *Narasimha Rao Pantulu* v. *Seshayya*[6], though the suit was for redemption by the mortgagor against the usufructuary mortgagee and was brought before the period of 55 years stipulated in the mortgage, the question of possession became academic inasmuch as the period expired after the decree in the District Munsif's Court and before the appeal was filed in the District Court and possession was actually handed over by the mortgagee to the plaintiff. Moreover, the mortgage deed in that case was apparently unlike the mortgage deed in the present case. On Letters Patent Appeal, Venkatasubba Rao, J., observed that the case was covered by clause (*a*) of section 62 of the Transfer of Property Act which is in these terms;

> "In the case of a usufructuary mortgage, the mortgagor, has a right to recover possession of the property (a) where the mortgagee is authorised to pay himself the mortgage money from the rents and profits of the property—when such money is paid".

The question that they had to consider was whether the sum of Rs. 60 which the mortgagee undertook to pay to the mortgagor as a personal allowance was to be treated as rents and profits of the property for which he was bound to account to the mortgagor in the redemption suit. It was held that as the sum was set apart from the rents and profits of the property for this purpose, its non-utilisation for the object stated in the deed rendered it a part and parcel of the rents and profits for which the mortgagee was accountable on redemption. Though reference is made by Devadoss, J., to *Chhotku Rai* v. *Baldeo Sukul*[5], it is really strange that no mention is made of the later decision in *Kandasami Pillai* v. *Ramaswami Mannadi*[3], dissenting from the Allahabad decision. Citing *Chhotku Rai* v. *Baldeo Sukul*[5], in his support the learned Judge says,

1. I.L.R. 22 Bom. 176.
2. (1912) I.L.R. 34 All. 273.
3. (1918) I.L.R. 42 Mad. 203: 36 M.L.J. 313.
4. (1894) I.L.R. 18 Mad. 126.
5. (1912) I.L.R. 34 All. 659.
6. (1924) 48 M.L.J. 363.
7. (1929) 57 M.L.J. 800.
8. (1920) I.L.R. 43 Mad. 712: 38 M.L.J. 467.
9. (1910) I.L.R. 34 Mad. 543.

"I think it is equitable that he should not be allowed to insist upon one of the terms of the mortgage deed being given effect to when he himself gives a go-by to the other terms of the deed."

It is exactly the existence of any such supposed rule of equity that was negatived in *Kandasami Pillai* v. *Ramasami Mannadi*[1]: Venkatasubba Rao and Reilly, JJ. do not go into the question of possession as it became unnecessary and they rest their decision on the simple ground that the mortgagee was to be debited with a sum of Rs. 60 which he undertook to pay as a personal allowance to the mortgagor and which by reason of the non-payment had become part and parcel of the rents and profits of the property from which it was carved out. It was in this manner that they met the argument raised for the mortgagee that the sum of Rs. 60 was to be treated as an independent amount in his hands for which the mortgagor should file a separate suit.

The present is not a case where the mortgagee sues for possession when probably we can impose on him the term that he should pay to the mortgagor the two amounts which he undertook to pay to the creditors and which the mortgagor had to pay by reason of his default. This is a case where the mortgagor comes to Court and says that he is entitled to redeem before the period fixed for redemption because what was advanced was much less than the amount of the consideration specified in the mortgage. It should be noted also that this suit was not filed after the sum of Rs. 100 was discharged, for he himself admits according to his calculation that there was still a sum of Rs. 31 due and that he was prepared to pay it to the mortgagee. According to the findings of the lower court, the income from the property is only Rs. 25 and on the date when the suit was filed only 1¼ years had elapsed from the date of the mortgage. It is a case therefore where the suit for redemption even assuming the contentions of the plaintiff to be correct was really premature. The mortgage deed does not provide for any particular rate of interest nor does it give any estimate of the rents and profits. Mr. Swaminatha Aiyar contended that as Rs. 100 only had been advanced, we must cut down the period *pro rata* and also work out the interest at the rate of Rs. 25 on a principal of Rs. 625. All this is speculation and to say anything of the kind would be to make a new contract for the parties. We are beyond the stage of a contract and in the stage of a conveyance of property, and the period fixed for redemption must govern the rights and relations of the parties in the absence of a contract to the contrary. If one of the parties does not conform to or fulfil the requirements or the obligations imposed on him the other party may have a remedy in damages against him. But to say that because he has failed to advance the full amount the mortgagor has got a right to come before the Court seeking possession even though he has definitely undertaken that the mortgagee should remain in possession for a period of eleven years is to hold what the law will not allow on the authorities cited and discussed above.

The second appeal is allowed. Each party will bear his own costs in the lower courts, but the respondent will pay the appellant's costs here.

(Leave refused).

K.S. *Appeal allowed.*

---

1. (1918) I.L.R. 42 Madras 203: 36 M.L.J. 313.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD THANKERTON, LORD SIMONDS, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The Maharajah of Pithapuram ... *Appellant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 16 (1) (c) inserted by Act (VII of 1939)—Applicability to income from revocable settlements made by the assessee long before the Amending Act came into force—Such income, though accrued before the amendment came into operation, can be deemed to be the income of the assessee as contemplated in the section.

The income of the year 1938-1939, derived from the assets comprised in revocable instruments of trust and settlement executed by an assessee in favour of his daughters long prior to the commencement of the Indian Income-tax (Amendment) Act VII of 1939 can be deemed to be the income of the assessee as contemplated by clause (*c*) of sub-section (1) of section 16 of the Indian Income-tax Act XI of 1922, though such income accrued before the passing of the Amending Act VII of 1939.

(1942) 1 M.L.J. 16 (S.B.) *affirmed.* Distinction between the Indian and the English Income-tax Acts pointed out.

Appeal from a judgment of a Special Bench (Leach, C.J., Wadsworth and Patanjali Sastri, JJ.) of the High Court of Judicature at Madras in its ordinary original civil jurisdiction, dated 15th September, 1941, answering a reference under section 66 (2) of the Indian Income-tax Act (XI of 1922).

J. D. Casswell, K. C. and *N. E. Mustoe* for Appellant.

J. Millard Tucker, K. C. and *R. K. Handoo* for Respondent.

Their Lordships' judgment was delivered by

LORD THANKERTON.—This appeal arises on a reference by the Commissioner of Income-tax, Madras, on the requisition of the appellant, under section 66 (2) of the Indian Income-tax Act, 1922 of the following question of law, *viz.*:—

"Whether the income of the year 1938-39, derived from the assets comprised in the revocable instruments of trust and settlement executed by the petitioner in favour of his four daughters on the 6th April, 1933, *i.e.*, before the commencement of the Indian Income-tax Act (VII of 1939), can be deemed to be income of the petitioner under revocable transfers of assets as contemplated by clause (*c*) of sub-section (1) of section 16 of the Indian Income-tax Act (XI of 1922) as amended by the Indian Income-tax Act (VII of 1939)".

For the year 1939-1940 the appellant was assessed to income-tax on a total income of Rs. 2,19,640, which included a sum of Rs. 177,374, representing the total of the income arising from assets settled on his four daughters by the appellant by four deeds, all dated the 5th April, 1933, and all of which, subject to the necessary variation in the name of the particular beneficiary, were subject to the same conditions, *viz.*:—

(*i*) the properties were to be held in trust for each of his daughters by the appellant during his life-time as trustee and after his death by his eldest son, the Yuvarajah of Pithapuram, as trustee;

(*ii*) the properties were to be held in trust for each of the daughters for life and on their death, for their issue, male and female, and, in the event of any of the said daughters dying without issue, the properties were to revert to the holder for the time being of the Pithapuram estate;

(*iii*) the appellant reserved to himself the full power to revoke the settlement or make any fresh disposition he liked;

(*iv*) the trustee for the time being had the right to convert (into money) the properties described in the schedules and invest the same in any of the recognised securities under the Indian Trust Act;

*P.C. Appeal No. 33 of 1944. 26th February, 1945.

(*v*) so long as the appellant was the trustee he had the absolute and uncontrolled discretion to invest in any kind of securities as he liked and without reference to the provisions of the Trust Act.

In each year of assessment up to and including the year 1938-1939 the income arising from the properties settled on each of the daughters was assessed separately in the name of each, though the assessment was made on the appellant as their trustee. In the assessment year 1939-1940 the Income-tax Officer sought to apply an alteration in the law enacted by section 18 of the Indian Income-tax (Amendment) Act, 1939 (Act VII of 1939), which came into force on the 1st April, 1939, by virtue of a Government Notification in terms of section 1 (2) of the Act, and to treat the income of the daughters as the income of the appellant. The appellant's objections to this course have so far been without success and are the subject of this appeal.

The material part of section 18 of the Act of 1939, is as follows:—

"18. In section 16 of the said Act:—

(*a*) for sub-sections (1) and (2) the following sub-sections shall be substituted, namely:—

(1) In computing the total income of an assessee—

* * * * * *

"all income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-tax (Amendment) Act, 1939, from assets remaining the property of the settlor or disponor shall be deemed to be income of the settlor or disponor, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor:

"Provided that for the purposes of this clause a settlement, disposition or transfer shall be deemed to be revocable if it contains any provision for the retransfer directly or indirectly of the income or assets to the settlor, disponor or transferor, or in any way gives the settlor, disponor or transferor, a right to resume power directly or indirectly over the income or assets:

Provided further that the expression "settlement or disposition" shall for the purposes of this clause include any disposition, trust, covenant, agreement, or arrangement and the expression 'settlor or disponor' in relation to a settlement or disposition shall include any person by whom the settlement or disposition was made:

Provided further that this clause shall not apply to any income arising to any person by virtue of a settlement or disposition which is not revocable for a period exceeding six years or during the lifetime of the person and from which income the settlor or disponor derives no direct or indirect benefit but that the settlor shall be liable to be assessed on the said income as and when the power to revoke arises to him."

Before dealing with the particular grounds of appeal, their Lordships consider it desirable to make some general observations as to Indian Income-tax law, which may clear away a certain confusion of thought which would appear to affect certain of the contentions in the present case.

In the first place, it is clear to their Lordships that under the express terms of section 3 of the Indian Income-Tax Act, 1922, the subject of charge is not the income of the year of assessment, but the income of the previous year. This is in direct contrast to the English Income-tax Acts, under which the subjtct of assessment is the income of the year of assessment, though the amount is measured by a yardstick based on previous years. The difference is well illustrated by the distinction that in England the source of income must still be extant in the year of assessment but that is not of relevance in India. Their Lordships may refer to the able judgment of Rankin, C.J., in *Behari Lal Mullick* v. *Commissioner of Income-tax, Bengal*[1], with which they agree.

In the second place, it should be remembered that the Indian Income-tax Act, 1922, as amended from time to time, forms a code, which has no operative effect except so far as it is rendered applicable for the recovery of tax imposed for a particular fiscal year by a Finance Act. This may be illustrated by pointing

1. (1927) 2 I.T.C. 329.

out that there was no charge on the 1938-1939 income either of the appellant or his daughters, nor assessment of such income, until the passing of the Indian Finance Act, 1939, which imposed the tax for 1939-1940 on the 1938-1939 income and authorised the present assessment. By sub-section (1) of section 6 of the Indian Finance Act, 1939, income-tax for the year beginning on the 1st April, 1939, is directed to be charged at the rates specified in Part I of Schedule II, and rates of super-tax are also provided for, and by sub-section (3) it is provided that "for the purpose of this section and of Schedule II, the expression 'total income' means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922". This can only refer to the Indian Income-tax Act, 1922, as it stood amended at the date of the Indian Finance Act, 1939, and necessarily includes the alterations made by the Amending Act, which had already come into force on the 1st April, 1939.

In this view, the only question is whether the income arising from the properties settled by the four deeds under consideration, falls within the terms of section 16 (1) (*c*) of the Income-tax Act. The first question would naturally be whether under these four deeds the assets from which the income arise remained the property of the appellant, or whether they involved a transfer of assets, though clearly a revocable transfer. From the way in which the present case has been presented throughout, including the hearing before the Board, their Lordships find it unnecessary to consider this question or to express any view on the matter. In the question referred these deeds are regarded as involving revocable transfers of assets; in their judgment the High Court state: "It is admitted, as it must be, that the deeds executed by the assessee operate to transfer the assets"; and, at the hearing before the Board, both parties accepted the same view. The only argument left to the appellant was to found on the express insertion of the words "whether effected before or after the commencement" of the 1939 Amendment Act in the first category of settlements and their absence in the latter case of revocable transfers of assets, and to seek to derive therefrom an implied exclusion in the latter case of transfers effected prior to the commencement of the Amending Act, *viz.*, the 1st April, 1939. Their Lordships can find no reason to justify such an alteration of the plain words of the section, which would involve the insertion after the words "a revocable transfer of assets" of the limiting words, "effected after the commencement of the Indian Income-tax (Amendment) Act, 1939."

Accordingly their Lordships are of opinion that the decision of the High Court was right and should be affirmed and they will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the respondent's costs of the appeal.

Douglas Grant and Dold: Solicitors for the Appellant.

Solicitor, India Office: Solicitor for the Respondent.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Oorpayil Manjole Mundathottil Achuthan Nayar .. *Appellant* (*1st Deft.*)*

v.

Oorpayil Mundathottil Narayani Amma's son Madhavan Nayar .. *Respondent* (*Plaintiff*).

Malabar Tenancy Act (XIV of 1930, section 14 (5)—Landlord requiring the land for his own cultivation—Bona fides—Assertion of landlord not sufficient—Paddy rent—Computation of value in money.

Section 14 of the Malabar Tenancy Act provides exceptions to the general rule that a cultivating *verumpattomdar* cannot be evicted from his holding; and a Court cannot accept

*Appeal against Order No. 49 of 1944. 30th November, 1944.

a mere statement of a landlord-plaintiff that he requires a land *bona fide* in his own interests: The Court must be satisfied that the assertion made by the landlord is a *bona fide* assertion.

Narayanan Moossad v. *Mammadissa*, A.I.R. 1937 Mad. 795, relied on.

It is the market rate on the date when paddy rent became due that determines what cash is to be paid for the arrears of rent.

Parameswaran Nambudripad v. *Subramania Iyer*, (1944) 2 M.L.J. 84, relied on.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut, dated 12th August, 1943, and made in A.S. No. 40 of 1942 (A.S. No. 30 of 1941, Subordinate Judge's Court, Ottapalam) preferred against the decree of the Court of the District Munsif of Ottapalam, dated 31st December, 1940, and passed in O.S. No. 84 of 1939.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

The Court delivered the following

JUDGMENT.—The respondent sued for the eviction of the appellant, his tenant, on the ground that within the meaning of section 14 (5) of the Malabar Tenancy Act he required the land *bona fide* for his own cultivation. Nine issues were raised and considered by the trial court, which conditionally dismissed the suit on the ground that the plaintiff had not proved that he required the suit property *bona fide* for his own cultivation. This question was carefully considered by the learned District Munsif. In appeal, the learned Subordinate Judge pointed out that the learned District Munsif had wrongly considered whether the landlord had any necessity for the land instead of considering whether he needed the land *bona fide*. The learned Subordinate Judge, without any further discussion of the matter, except to say that there was nothing in the case to rebut or displace the evidence of P.W. 1 as to his *bona fides*, decided this issue in favour of the plaintiff. Three lines of discussion for deciding the important issues is certainly insufficient for a reversing judgment. Section 14 provides exceptions to the general rule that a cultivating verumpattamdar cannot be evicted from his holding; and so a court cannot accept a mere statement of a plaintiff that *he* requires a land *bona fide* for his own interests, or the whole object of the Act would be frustrated by a bare assertion of that kind. The learned District Munsif referred to the judgment of Varadachariar, J., in *Narayanan Moossad* v. *Mammadissa*,[1] who said that: "the words *bona fide*, if they have any significance at all, must mean that the court must be satisfied, that the assertion made by the landlord as regards his own requirement of the land is a *bona fide* assertion." The learned Subordinate Judge has not considered the question at all, and has made no reference to the above case. As I have not read the evidence of P.W. 1, I cannot express any opinion on this matter. As the question is one of fact it must be decided by the lower appellate Court. I therefore remand the appeal for fresh disposal, after reconsideration and discussion of this issue by the learned Subordinate Judge.

The learned advocate for the appellant points out that the notice of eviction calls upon the respondent to leave the land by the 11th of March, whereas section 14 (5) of the Malabar Tenancy Act permits the landlord to have the land only from the end of an agricultural year. That is, however, a small matter. Although the landlord cannot have the land on the 11th of March his demand can be complied with on the 30th of March.

A memorandum of cross-objections has been filed by the respondent with regard to the rate at which paddy rent should be converted. The learned Subordinate Judge has said that the rent payable will be the average rent for the past five years and not the market rate, as the first court held. It has been held by this Court in *Parameswaram Nambudiripad* alias *Narayanan Thrathar Nambu-*

1. A.I.R. 1937 Mad. 795.

diripad v. *Subramania Iyer*,[1] that it is the market rate on the date when the rent became due that determines what cash is to be paid.

The appeal is therefore allowed and A.S. No. 40 of 1942 remanded for fresh disposal in the light of the above remarks. If it is found that the plaintiff does not require the land *bona fide* for his own cultivation, then the appeal will have to be dismissed; but, if, on the other hand, the learned Subordinate Judge is of the same opinion after remand on the question of *bona fides*, then the suit will have to be remanded by him, because both parties agreed that it should be remanded on points 2, 3 and 4 in view of the court's finding on point 1.

The costs of the appeal and of the memorandum of cross-objections will be costs in the cause.

K. S. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Deceased Thazhetheranjoli Kozhipro Achuthan Nayar's heirs and children Vola Veettil Kottapurath Janaki Amma and another .. *Appellants**

v.

Tazhetheranjoli Kozhipro Raman Nayar and others .. *Respondents.*

Madras Marumakkattayam Act (XXII of 1933), section 19—'Children'—Means legitimate children—Children of ordinary Marumakkattayam marriage—Right to inherit the self-acquired property of their father.

Children in section 19 of the Madras Marumakkattayam Act, 1933, means legitimate children. Ordinarily children of a Marumakkattayam marriage are not the offspring of a legal marriage and such children can inherit the self-acquired property of their father only if the union between their parents has become legal by statute. Where the statute under which the union is claimed to have become a legal marriage is the Madras Marumakkattayam Act, it has to be shown that the union is a subsisting one, for the Act applies only to subsisting marriages. A union that has been terminated by the death of one of the parties thereto is no longer a union and so does not subsist. Hence, the offspring of such union cannot claim to inherit the self-acquired property of their father.

Appeals against the decree of the Court of the Subordinate Judge, Calicut, in A.S. 121 and 123|42 (A.S. 55 and 58|42, District Court, South Malabar) preferred against the decrees of the Court of the District Munsif, Calicut, in O.S. No. 885 and 1068|40.

D. A. Krishna Variar for Appellants.

C. K. Viswanatha Ayyar and *V. P. Gopalan Nambiar* for Respondents.

The Court delivered the following

JUDGMENT.—The question is whether the appellants, born of an ordinary Marumakattayam union, are entitled to inherit the self-acquired property of their deceased father. Both the Courts held that they were not.

The law of intestacy ordinarily applied to those who follow the Marumakattayam system is that the self-acquired property of a male passes to his tarwad upon his death. It has always been held that the customary union between persons subject to the Marumakattayam law is not a legal marriage and that, consequently, the offspring are not legitimate children who can claim to inherit their father's property under the ordinary Hindu law. Act IV of 1896 made such unions legal marriages provided that they were registered, with the effect of making children both before and after the registration legitimate. Act XXII of 1933 went a step further and recognised such unions whether they were registered or not, provided that the union:

---

1. (1944) 2 M.L.J. 84.

*S.A. Nos. 1353 and 1468 of 1944. 30th January, 1945.

(1) had been solemnised with the customary ceremonies and was subsisting on the date when the act came into force; or

(2) was so solemnised after the Act came into force; or

(3) had been registered as a marriage under the Act of 1896, and was subsisting on the date when the 1933 Act came into force.

The devolution of property upon the death of a male following the Marumakattayam law upon intestacy is set out in section 19. The principal question argued here is whether the expression "children" in section 19 means children of any union, however irregular, or whether it means legitimate children. No authority is necessary to show that the ordinary meaning of "children" in statutes is legitimate children, unless the contrary is indicated in the statute itself. If it were otherwise, then section 19 would give a right to their father's property to the offspring of even adulterous or fleeting connections. If "children" in section 19 means legitimate children, then the appellants can inherit their father's property only if they are the offspring of a legal marriage between their parents. Ordinarily, as I have already said, the children of such union are not the offspring of a legal marriage; so that the appellants can only succeed if the union between their parents has become a legal marriage by statute. The only Act by which they claim that the union between their parents become a legal marriage is Act XXII of 1933. This Act, however, applies only to subsisting marriages. The very wording of section 4 (1) (*b*) (*iii*) says so expressly. A union that has been terminated by the death of one of the parties to the union is no longer a union and so does not subsist.

The learned advocate for the appellants argues that this could not have been the intention of the legislature; for the offspring of a union recognised by the Act of 1896 would not then have the benefit of the present Act if the mother had died before the Act of 1933 came into force. That, however, is not the case. If children were born of a marriage recognised by the Act of 1896 they would be legitimate children and would therefore be entitled to inherit property under section 19. I have been referred to section 30 of the Act which deals with the devolution of property upon the death intestate of a male not following the Marumakattayam system; but we are not concerned with such a case. I do not find anything in section 30 which makes it improbable that the Legislature intended that section 4 and section 19 should be read according to their plain wording. It is further argued that if section 19 applies only to legitimate children, section 50 would be unnecessary. That, too, is not the case; for section 50 is of wide application and does not and is not meant to apply only to the rights of children under section 19.

It was finally argued that it was not open to the respondents to deny the appellants' claim, because in former proceedings it was held that the appellants are the legal representatives of their father. That decision was in proceedings under Order XXII, rules 3 and 5 of the Civil Procedure Code. Such a decision would probably not operate as *res judicata* in subsequent proceedings; but the matter has not been argued fully here, because the point was not taken in the memorandum of appeal and the learned advocate for the respondent is consequently not ready to argue the question. It is found in the memorandum of appeal to the lower appellate Court, but seems not to have been argued. This is not altogether a question of law, although no doubt the nature of the previous litigation could be readily ascertained by reference to documents in Court. As the matter has not been taken in the memorandum of appeal, it is not necessary for me to express any opinion on this question.

The appeals are dismissed with costs (advocate's fee one set).

V.S. —— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Somu Achari .. *Appellant**

v.

Singara Achari and another .. *Respondents.*

Transfer of Property Act (1882), sections 54 and 55 (4) (b)—Relinquishment by one member of his share in the family property in favour of another member under a deed of release—Execution of promissory note for the consideration amount—Assignment of pronote to third party—Suit on pronote and decree—Non-realization—Decree assigned to original promisee—Suit by latter to recover the amount as the charge of an unpaid vendor—Release, really a sale—Charge of the unpaid vendor not put an end to by the suit on the pronote and the decree therein.

The plaintiff relinquished his share of the family property in favour of his brother, the 1st defendant for a sum of Rs. 150 under a document styled a release. It recited: "In full quit of my right for a share it is settled that I should take Rs. 150 and as I have received the said sum of Rs. 150 by the execution of a promissory note by you this date, I have no manner of right or claim in respect of the undermentioned family properties or the debts and outstandings. To this effect I have executed this release." The promissory note was assigned to a third party who after suing upon it and obtaining a decree and failing to realize the amount assigned the decree to the plaintiff. In a suit by the plaintiff to recover the Rs. 150 with interest claiming the charge of an unpaid vendor,

Held, that the use of the word 'release' in the document was not conclusive and that as the right of the executant to a half share in the family property was conveyed to the 1st defendant, in whose favour the document was executed, it satisfied the terms of section 54, Transfer of Property Act, and was in the nature of a sale by one member of joint Hindu family to another member. Consequently section 55, Transfer of Property Act, applied and the plaintiff had a charge for the unpaid purchase money. Neither the execution of the promissory note nor the filing of a suit thereon and obtaining of a decree, could put an end to that charge.

Appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in A.S. 178|43 preferred against the decree of the Court of the District Munsif, Tiruvarur, in O.S. 302|42.

R. Desikan and *V. Ramachandran* for Appellant.

S. Swaminatha Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff executed Ex. P-1 in favour of his brother, Singara Achari, on 3rd December, 1929. The two were brothers and the plaintiff relinquished his share in the family properties for a sum of Rs. 150. The relevant part of this document runs thus,

"In respect of the properties belonging to both of us in 108, Narayana Mangalam, Nannilam taluk, Kodavasal Sub-district, Tanjore District, and in respect of my share therein, you shall yourself take the entire properties and discharge all the debts due and recover the outstandings, if any. To this effect we have agreed, and in full quit of my right for a share, it is settled that I should take Rs. 150 and as I have received the said sum of Rs. 150 by the execution of a promissory note by you this date, I have no manner of right or claim in respect of the undermentioned family properties or the debts and outstandings. To this effect I have executed this release."

The promissory note was transferred to one Swaminatha Pathar who filed a suit upon it and obtained a decree. The decreeholder was unable to realise any amount and he thereafter assigned his decree under Ex. P-3 on 3rd July, 1942. The present suit was filed on 3rd August, 1942, to recover the amount of Rs. 150 with interest claiming a charge on the property. The charge claimed is that of the unpaid vendor given under the Transfer of Property Act. It is found that the second defendant is not a *bona fide* purchaser who took an alienation of the property without notice of the charge if one is to be held to exist in favour of the plaintiff. The only question therefore is whether there was a charge created under the Transfer of Property Act in favour of the plaintiff and whether the suit is in time. On the first question the lower Courts have held that the

*S.A. No. 1773 of 1944. 14th February, 1945.

document is only a release and not a sale and that therefore the provisions of section 55 of the Transfer of Property Act are not applicable. I am unable to agree with this conclusion. The document which has been set out clearly says that in full quit of the executant's right to a share he was to be paid Rs. 150. The definition of the sale contained in section 54 of the Transfer of Property Act is satisfied in this case. Under section 54, "sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. In the present case, a sum of Rs. 150 promised to be paid is the price. The price must no doubt be in money and that requirement is satisfied in this case. The answer would have been different if what was promised to the plaintiff under the document was some other property or something which is not money. Here it is Rs. 150 which is the consideration and this part of the definition is therefore satisfied. Then it is said that the expression used is release and that a release is a mere relinquishment and does not operate as a transfer. It has been pointed out repeatedly by this Court that what we have to do is to see all the terms of the document and consider whether there is not an intention that what was till then the right of the executant is being conveyed to the person in whose favour the document is executed. The word release is not conclusive. *Doraiswami Pillai* v. *Chinnia Goundan,*[1] is in point. In that case, the plaintiff filed the suit on the footing that his father was adopted by the widow of the last maleholder. The adoption was denied by the defendants and thereupon the plaintiff armed himself with a document from a person who would be entitled to succeed to the property if the adoption of the plaintiff's father was not true or valid. The document was produced in Court and marked as Ex. R. By that document the executant released all his rights in favour of the plaintiff. It was contended that the document was only a release and not a conveyance. The learned Judge in dealing with this contention says at page 266,

"By that document the heir released all his rights in favour of the plaintiff. We cannot agree with the Subordinate Judge that Ex. R does not purport to be and is not a conveyance. The word used is "release" but the intention to transfer any rights which the executant of the document has is clear and we see no sufficient reason why it should not be treated as a conveyance."

In the present case the right of the executant was to a half share in the entire family properties. That is made over to Singara Achari in consideration for a sum of Rs. 150. I hold that the document satisfies the terms of section 54 of the Transfer of Property Act. There is nothing in the Hindu law to prevent a member of a joint family from selling his share to another member of the family and Ex. P-1 appears to me, to be a sale of this nature. Consequently section 55 of the Transfer of Property Act applies and the plaintiff had a charge for the unpaid purchase money. It is not contended that the mere execution of a promissory note for the amount of the unpaid purchase money is a contract to the contrary within section 55 of the Act.

The next question is whether by reason of the promissory note having been transferred to Swaminatha Pathar and a decree having been obtained thereon, the right of the plaintiff to enforce the charge is lost. A somewhat similar question arose in *Bhavani Ammal* v. *Nataraja Iyer.*[2] There, the promissory note which was executed for a debt due by the joint family was transferred to her daughter for collection. Then suit was filed by the assignee and nothing was recovered. Thereupon both the assignor and the assignee joined in the suit as plaintiffs 1 and 2 and filed the suit for recovery of the amount from the joint family property basing the suit on the original debt. The question was whether the transfer of the promissory note in favour of another person who obtained a decree thereon put an end to the claim on the debt. It was held that the fact that the promissory note was transferred to a third party does not mean that the right to proceed to recover on the original debt is lost. In this case the promissory note was no

1. (1917) 34 M.L.J. 258. 2. (1945) 1 M.L.J. 165.

doubt made the subject of a suit and a decree but the decree has been transferred by Swaminatha Pathar to the plaintiff. No amount was recovered by Swaminatha Pathar, the decreeholder under that decree. If the mere execution of a promissory note does not put an end to the charge, then the fact that the suit was filed on it and a decree obtained does not put an end to the charge. If the promissory note was sued upon and money recovered, then the claim would be satisfied, but that is a different matter. In this case the decree was assigned by Swaminatha Pathar in favour of the plaintiff and there is no further impediment in the way of the plaintiff in getting his relief on the charge created by section 55 of the Transfer of Property Act.

The last question is whether the suit is in time. The plaintiff says that the suit is saved from the bar of limitation by Ex. P-2. Ex. P-2 runs thus,

"Does it not strike you that you have sufficiently disgraced me by having me arrested? When the decreeholder is asked to release me he says he could not do so without your permission. When you have the security of the property why should you send me to jail unnecessarily? Realise the amount by proceeding against the property."

This is a letter addressed by the first defendant to the plaintiff. It unmistakably shows that there was a subsisting liability. In fact, the writer asks the plaintiff to release the amount by proceeding against the property and also takes the plaintiff to task for sending him to jail unnecessarily when there was the security of the property available. We cannot have an acknowledgment of a subsisting liability in clearer terms. The result is that the suit succeeds and there will be a decree as prayed for with costs throughout. The preliminary mortgage decree will be drawn up with 15th April, 1945, as the date fixed for payment. The plaintiff will have his costs throughout. No leave.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE SOMAYYA.

Vemuri Subbayya .. *Appellant**

v.

Bayya Nagaratnamma and others .. *Respondents.*

Execution Stay by Appellate Court—Subsequent attachment under warrant issued prior to receipt of stay order—Validity.

An order for stay obtained from the Appellate Court, on the 9th July, 1942, was not communicated by that Court to the trial Court until the latter Court rose for the day. In pursuance of an earlier order for attachment a warrant had been issued by the trial Court to an amin on that date for the attachment of certain movables of the judgment-debtor. The amin attached the movables the next morning even though the judgment-debtor informed him about the stay order passed by the Appellate Court. On the question whether the attachment was valid,

Held, that it is the communication of the stay order from the Appellate Court that would deprive the trial Court of its jurisdiction to proceed with the execution. In the circumstances as the Appellate Court did not communicate its order to the trial Court until the business of the trial Court began on the 10th July, the authority of the trial Court to execute the decree was not ousted. The authority of the amin is not taken away until the Court which granted the authority terminates it and informs him that it has been terminated. Hence the attachment was properly made. The amin could refrain from effecting the attachment only if the warrant was withdrawn. He could not act on the statement of the judgment-debtor.

Appeals against the orders of the Court of the Subordinate Judge, Guntur, dated 29th November, 1943, and made in A.S. Nos. 105 and 107 of 1943 respectively preferred against the order of the Court of the District Munsif, Guntur, dated 21st December, 1942, and made in E. A. Nos. 1842 and 1843 of 1942 respectively in O. S. No. 530 of 1941.

K. Kameswara Rao for Appellant.

K. Kotayya for Respondents.

---

*A.A.A.O. Nos. 132 and 133 of 1944. *22nd February, 1945.*

The Court delivered the following

JUDGMENT.—The question in this case is, in my opinion, really concluded by the decision of the Full Bench in *Venkatachalapati Rao* v. *Kameswaramma.*[1] An order for stay was obtained from the Appellate Court on the 9th July, 1942, but it was not communicated by the Appellate Court to the trial Court until the latter Court rose for the day. It seems to have been received in the office of the District Munsif after court hours. A warrant had been issued for the attachment of certain movables of the judgment-debtor on the same day, and the finding of the lower Court is that it was done long before the trial Court had notice of the stay order. The order for attachment was issued even prior to the passing of the order of stay by the Appellate Court. The warrant was issued to an amin, and the amin attached certain movables early on the morning of the next day. The question is whether the attachment is valid.

Mr. K. Kameswara Rao, learned advocate for the appellant, argues that the amin and the decreeholder's son were personally aware of the order of stay passed by the District Court on the previous day. This is found against by the lower Appellate Court. Then, it is said that at the time when the attachment was made, the judgment-debtor informed the amin that a stay order had been passed by the District Court on the previous day. This appears to be so, but the question is whether the attachment effected without the warrant having been recalled and while it was in force is valid. Here it cannot be said that the order was communicated by the superior authority, the District Court, even to the District Munsif's Court until the Munsif's Court sat the next day at 11 o'clock. The mere fact that the order reached the office late in the evening of the 9th does not mean that it reached the District Munsif at any time before the office business commenced on the 10th morning. By the warrant which had been issued the previous day the amin was directed to attach certain movables. He would be guilty of gross dereliction of duty if he did not do his duty, and he could refrain from effecting the attachment only if the warrant was withdrawn.

Mr. Kameswara Rao urges that it is not necessary that the order of the superior Court should be officially communicated to the lower Court, and that it is enough if the trial Court is informed by any one of the fact that the superior Court has ordered the stay. This question is concluded by the decision in *Venkatachalapati* ordered the stay. This question is concluded by the decision in *Venkatachalapati Rao* v. *Kameswaramma.*[1] There the attachment was effected after the stay order was passed by the Appellate Court and before it was communicated to the trial Court. An alienation was made after the attachment was effected; and the question was whether the alienation prevailed over the claims enforceable under the attachment. If the attachment had not been validly effected, then the alienation would have prevailed. The question was answered by the Full Bench holding that the attachment was valid and they dissented from the view taken by the Court in an earlier decision in *Ramanatha* v. *Arunachala.*[2] In the earlier case it was held that the moment the appellate Court passed the order of stay, the trial Court became *functus officio.* That decision has been definitely overruled by the Full Bench in the latter case. Further, Ayling, J., who delivered the leading judgment of the Full Bench says this at page 154,

> "I regard an order of an Appellate Court staying execution as in the nature of a prohibitory order to the lower Court which becomes effective only on communication. Till it is communicated, steps in execution taken by the lower Court must be treated as legally valid."

Seshagiri Aiyar, J., said this,

> "A Court exercising jurisdiction which is conferred on it in express terms, cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. This principle of jurisprudence should not be departed from unless there is any legislative provision to the contrary."

---

1. (1917) 33 M.L.J. 515: 41 Mad. 151 (F.B.).
2. (1913) 26 M.L.J. 275: 38 Mad. 766.

The expression "till it is communicated" used by Ayling, J., really means communicated by the superior authority, who passed the stay order. Any doubt on this question is cleared by what Seshagiri Aiyer, J., said that the Court exercising jurisdiction cannot be regarded as having been deprived of it unless the superior authority informs it that that has been done. Thus it is the communication from the superior authority that will deprive the trial Court of its jurisdiction to proceed with the execution. In this case, the superior authority did not communicate to the trial Court until the business of the trial Court began on the 10th July. Therefore the view taken by the lower Court that the authority of the trial Court to execute the decree was not ousted is correct.

Then it is argued that the amin was told about the order before he really effected the attachment and that it is not necessary to communicate the order to the ministerial officer and that it is enough if it is communicated to the Court. This argument is pressed in the view that communication had been made officially to the District Munsif on the 9th, though late in the evening. I have already held that this is not enough, and it is only when the Court, *i.e.*, the presiding officer, would know about it, which could only be on the next day, that the order could be said to have been communicated by the authority to the subordinate authority. Even if this view is wrong, it only comes to this that the order had reached the District Munsif's Court but the order was not communicated to the sale officer. Is the amin who was entrusted with the duty of effecting the attachment bound to have stayed his hands on communication by the judgment-debtor is the question. Mr. Kameswara Rao urges that the amin must stay his hands the moment he is told by some one that the stay had been granted by the Appellate Court. This argument, if accepted, will lead to very inconvenient and startling results. A judgment-debtor may be found after great difficulty in arresting him and the moment he is caught, if on his mere statement that the order has been stayed, the amin is bound to let him go, it will involve the decree-holder in fresh proceedings to arrest him, and the judgment-debtor may not be found ultimately if let go on the first occasion when he was caught.

The true principle is, in my opinion, laid down in *Parsotham Saran* v. *Bahrma Nand.*[1] The authority of the agent or of the officer is not taken away until the Court which granted the authority terminates it and informs the agent or officer that it has been terminated. At page 47, Mukerji, J., says this,

"What principle, then, is there on which we are bound to hold that what was done in perfect good faith and in possession of clear jurisdiction becomes null and void solely because unknown to the Court below, an order had been passed? Taking analogy from general life; if *A* directs his agent *B* to purchase a ton of wheat from *C* and then countermands his order and if *B*, before he receives the subsequent order of *A*, makes the purchase from *C*, can it be contended with any show of reason that the purchase by *B* is not binding on *A*?...............It is undoubtedly true that the sale officer derives his authority to sell, from the Court. But so do all agents from the principal. But who has ever heard that the principal is not bound by the agent's act, if the agent is unaware of the fact that his authority has been revoked. A sale officer acts on behalf of the Court and is to the extent of his duties clearly defined, the Court's agent. The Court is bound to confirm a sale except under circumstances well defined. It has no arbitrary power to set aside a sale under all circumstances. If, then, it is urged that the mere fact that a stay order (uncommunicated) was made, made the sale illegal, some better reason must be found that the officer became *functus officio*, without his knowing this."

I respectfully follow the view propounded by Mukerji, J., in this case and hold that the attachment was properly made.

The other question raised is that there was a shortage when the property was re-delivered after the Court ordered re-delivery. It has been found as a question of fact by the lower Appellate Court that there is no proof of the actual quantity attached and it has held that what was attached was re-delivered. This is a finding of fact and no reason is shown for interference in second appeal.

Both the civil miscellaneous second appeals are dismissed with costs in C. M. S. A. No. 132 of 1944. No leave.

V.S. *Appeals dismissed.*

1. (1927) I.L.R. 50 All. 41.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL, AND MR. JUSTICE KUPPUSWAMI AYYAR.

S. K. R. S. Sabapathi Chettiar .. *Appellant**

v.

Lakshmanan Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rule 16—Defendants exonerated by petitioner not served with notice of petition—Recognition of assignment and ordering of execution—Legality.

On an application for execution by the assignee decree-holder notices were ordered to be served on the original decree-holder and the judgment-debtors. All were served except two of the judgment-debtors. The assignee decreeholder exonerated them from the decree. The petition was proceeded with and the assignment was recognised and the properties were directed to be sold. On a contention that the recognition of the assignment was invalid in the absence of notice to all the judgment-debtors,

Held, that the absence of notice to the exonerated defendants against whom the decree was not going to be executed and who were not interested in the execution proceedings would not affect the proceedings in execution. The Court had jurisdiction to recognise the transfer since notice had gone to all persons against whom the decree was to be executed and to the transferor.

Appeal against the order of the Court of the Subordinate Judge, Devakottah, dated 11—4—44 and made in E.P. No. 127 of 1943 in O.S. No. 1 of 1941.

R. Gopalaswami Aiyangar for Appellant.

M. S. Venkatarama Aiyar for Respondents.

The Judgment of the Court was delivered by

KUPPUSWAMI AYYAR, J.—The appellant is the eighth defendant and the appeal arises out of proceedings in execution of the decree in O.S. No. 1 of 1941, on the file of the Subordinate Judge's Court, Devakotta. The execution petition was filed by the assignee decreeholder. Notice was ordered to be issued to the original decreeholder and to the judgment-debtors. All of them were served except defendants 1 and 4. The petitioner exonerated defendants 1, 2 and 4 from the decree and as the others were served, the petition was proceeded with. The assignment was recognised and the properties of the eighth defendant which were sought to be proceeded against were directed to be sold. The petition was adjourned for settlement of sale proclamation. It is against that order this appeal has been filed by the eighth defendant. His contention is that since notice had not gone to all the judgment-debtors the assignment ought not to have been recognised as the service of notice on all the judgment-debtors is a condition precedent before such an order could be passed and that goes to the root of the jurisdiction. Secondly it was contended that the assignment was really a discharge and that the assignment was taken in the name of the respondent benami for the second defendant who was one of the judgment-debtors. On both the points the learned Subordinate Judge found against the appellant.

With regard to the question as to whether the assignment could not be recognised without notice being taken to defendants 1 and 4 our attention has been drawn to the proviso to Order 21, rule 16, Civil Procedure Code, which runs thus,

> "Provided that, where the decree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections (if any) to its execution."

It is urged that the Court had no jurisdiction to pass any orders with reference to the assignment until notice had gone to the transferor and to the judgment-debtor or judgment-debtors and their objections were heard. In this case notice had gone to the transferor and notice had also gone to all the judgment-debtors except defendants 1 and 4 who were exonerated from the decree by

---

*A. A.O. No. 302 of 1944. *28th February, 1945.*

the petitioner. The executing Court had no necessity to hear the objections of these persons against whom the decree was not going to be executed at any time. The question was considered by the Allahabad High Court in *Ram Deo Ram* v. *Frank Cooms.*[1] This is what was stated in that case,

"The question, therefore, is whether the auction sale should be held to be valid as against the mortgagor who did receive notice or whether it should be held to be altogether invalid. We consider that the mere fact that notice was not issued to the subsequent mortgagee is not a sufficient reason for holding that the auction sale was invalid as against the mortgagor. Accordingly we consider that by that auction sale the plaintiff acquired the rights of the mortgagor."

They also pointed out that in the rulings cited before them notice was not issued to any judgment-debtor at all.

The Calcutta High Court in *Charubala Dei* v. *Baikuntha Nath*[2] stated that if some of the judgment-debtors waived their rights to have notice then it would not invalidate the execution proceedings. This is what they stated,

"It therefore appears that the parties directly interested in the service of notices, under Order 21, rule 16, Civil Procedure Code, had expressly waived any rights which they may have had in respect of such notices. It appears from the provisions of Order 21, rule 16, Civil Procedure Code, that the notices to which reference is made in that rule are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so."

In this case there was no necessity for the issue of notice on those persons against whom the decree was not going to be executed and who were not interested in the execution proceedings. Consequently the absence of notice on those persons, we think will not affect the proceedings in execution. The learned Subordinate Judge was, therefore, justified in finding that since notice has gone to all persons against whom the decree was to be executed and to the transferor, the Court had jurisdiction to recognise the transfer and as the transfer was recognised by the executing Court, the decree was to be executed only against those to whom notice had gone.

With regard to the other question as to whether the assignment was *benami* for one of the judgment-debtors and therefore amounted to a discharge, there is absolutely no evidence except that of the petitioner as D.W. 1 and he had no personal knowledge of the discharge. He merely stated that the second defendant told him that the decree was discharged. But a statement by the second defendant to the witness will not be evidence of the truth of that statement. It is stated for the appellant that the assignment itself had not been proved but we find from the endorsement on Ex. P-1 signed by the Judge that it was admitted by D.W.-1, who is the appellant. It is true that in the counter it was stated that the plaintiff has to prove the assignment but then when the genuineness of the document was admitted by the appellant and it was marked as an exhibit it cannot be said that the appellant had been in any way prejudiced by the non-examination of any witness to prove it.

The appeal accordingly fails and is dismissed with costs.

V.S. — *Appeal dismissed.*

1. (1930) I.L.R. 52 All. 898.
2. A.I.R. (1939) Cal. 419.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE KUPPUSWAMY AYYAR.

Messrs. Samuel Fitz and Company, Limited, No. 26, Chowringhee, Calcutta .. *Appellants**

v.

Messrs. The Standard Cotton and Silk Weaving Co., Calicut .. *Respondents.*

Contract—Contracts for manufacture and delivery of goods by plaintiffs to defendant at Madras—Plaintiffs aware that the goods were to be sold in Australia—Import of such goods into Australia prohibited by Australian Government—Cancellation of orders—Liability of defendants to damages—Measure of damages.

Contracts were entered into between the plaintiffs and defendants for the supply by the plaintiffs at Madras to the specification given by the defendants of certain qualities of goods. The defendants had during the course of correspondence made it clear to the plaintiffs that they intended to sell the goods in Australia. Sometime later the Australian Government prohibited the import of such goods into Australia. As the defendants had lost the market on which they relied for the sale of the goods, they asked the plaintiffs to cancel their order. They agreed to do so on payment of compensation and in fact ceased to manufacture the goods ordered. On the questions as to (1) whether defendants could plead that they were unable to fulfil the contract and thereby escape all liability for damages and (2) if liable for damages, on what basis and to what extent,

Held, that it was clear from the contracts that the terms specified the samples, the size of the goods, the prices, the time of delivery and the destination (*i.e.*) Madras. There was no term in the contract that it should cease to be binding on the parties if for any reason the defendant should be unable to send the goods to Australia. The Court would not read into the contract an implied term that the enforceability of it is to be dependent upon the ability of the vendee to find customers for the goods. Nor could it be said that the foundation of the contract was that these goods should be resold by the vendees to their clients in Australia. Hence the defendants could not escape the liability for damages for their breach of the contract.

In such a case the measure of damages is the profit which the vendor would have made if the contract had been carried out. Under the circumstances 7½ per cent. of the contract price would be reasonable damages.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O.S. No. 23 of 1942.

B. Sitarama Rao and *T. Krishna Rao* for Appellants.

K. P. Ramakrishna Aiyar for *Respondents.*

The Judgment of the Court was delivered by

Horwill, J.—The appellant is a Joint Stock Company having its office at Calcutta. We know that it had dealings with a merchant in Australia to whom it sold cotton fabrics, described as tapestries, of the kind made by the plaintiff's limited company resident in Calicut, which made silk and cotton piecegoods. In October, 1941, the parties entered into correspondence with regard to the making of tapestries by the plaintiff for the defendant, who made it clear that he intended to sell them in Australia. The defendant company stated its requirements to the plaintiff and asked the plaintiff to send samples. After some correspondence, terms were fixed and contracts entered into between the parties for the supply, to the specification given by the defendant, of certain qualities of goods. We are here concerned with two contracts, one evidenced by Exs. P-1 and P-5 for the supply of 600 pieces, and the other for the supply of 90 pieces, evidenced by Exs. P-3 and P-5 (*a*). The defendant had taken delivery of many pieces under previous orders and had apparently sold them in Melbourne, but the Australian Government passed an order prohibiting the import of such goods after 1st April, 1942, except under conditions with which we are not now concerned. The result was that the market on which the defendants had relied for the sale of the goods purchased from the plaintiff under the contract was lost. The defendant wrote to the plaintiffs on 28th April, 1942, informing them of the circumstances and asking them to cancel their order. The plaintiffs replied that

*Appeal No. 48 of 1944. 1st March, 1945.

they were prepared to do so provided that the defendants paid compensation. This reply was clarified in a later letter, Ex. P-13 of 29th July, 1942, in which the plaintiffs made it clear that as a result of the cancellation of the contract they had ceased manufacture of the goods ordered, but claimed as damages 15 per cent. of the contract price, which they alleged were the profits they would have made had it not been for the breach of contract committed by the defendants.

The two main questions to be considered are (1) whether the defendants can plead that they were unable to fulfil the contract and so escape all liability for damages and (2) if liable for damages, on what basis and to what extent are they liable. The learned Subordinate Judge held that the defendants could not plead the impossibility of re-selling the goods to their agents in Australia as an answer to the plaintiff's claim. He accepted the basis put forward by the plaintiffs for estimating damages, namely, loss of profits. He did not, however, allow the plaintiffs the full extent of their claim, but granted them ten per cent. of the contract price as compensation for loss of profits and not 15 per cent. as claimed. The defendants have appealed, contending that they are not liable for damages at all and even if they are, the lower Court's order was not reasonable in granting 10 per cent. of the contract price as damages. The plaintiffs have filed a memorandum of cross-objections in which they claim the full 15 per cent. of the contract price which they claimed in the trial Court.

The contract, Ex. P-1, specifies the quantity required and their description. The acceptance, Ex. P-5, specifies the goods and says that they will be sent F.O.R., Madras; shipment in June-August (which apparently means at some time between June and August) and price less a discount of 20 per cent. The contract evidenced by Exs. P-3 and P-5 (*a*) is of a similar nature. There, too, the goods were to be sent F.O.R., Madras. It is clear from these contracts that the terms specified the samples, the size of the goods, the prices, the time of delivery, and the destination, *i.e.*, Madras F.O.R. The payment was to be against R.R. (Railway Receipt). There is thus no term of the contract that it should cease to be binding on the parties if for any reason the defendant should be unable to send the goods to their clients in Australia. The learned advocate for the appellants argues that in view of the general correspondence between the parties in which it is made clear that that was the purpose for which the defendants had purchased the goods, that it was an implied term of the contract that it should cease to be enforceable if for any reason that market was closed. The doctrine of the implied term was introduced into English law for the purpose of relieving plaintiffs from liability to supply goods where the supply became impossible; and Courts were prepared to read into a contract an implied term that the contract was not to be performed if performance was impossible. It is unnecessary to invoke that doctrine with regard to Indian contracts; because it is embodied in section 56 of the Contract Act. No case has been cited to us in which Courts have been prepared to read into a contract an implied term that the enforceability of the contract is to be dependent upon the ability of the vendee to find customers for the goods.

The learned advocate for the appellants argues alternatively that the very basis of the contract was the re-sale of the goods to Australia. We are unable to find any support for this argument in the correspondence. Nothing more appears from the documents exhibited or even from the oral evidence than that the plaintiffs were aware that the defendants proposed to sell the goods to their clients in Australia. It seems to us most unlikely that the plaintiffs' small company in Calicut entered into this contract on the basis that it would only be enforceable if the defendants in their turn were able to sell the goods in Australia. It may be possible in certain exceptional cases to say that the basis of the dealings between the parties was dependent upon a contingency not mentioned in the contract itself. Such an exceptional case was the subject of discussion in *Krell v. Henry*[1] relied

1. (1903) 2 K.B. 740.

on by the appellants. That was a case in which the plaintiffs, who owned a flat in Pall Mall, which was on the line of route of the coronation procession of King Edward VII, agreed to let out his flat for two days to the defendant. The coronation could not take place on account of the illness of the King, and the question was whether the contract could be enforced against the defendant. It was pointed out that the letting on hire was clearly for the purpose of permitting the defendant to view the coronation procession. The consideration of £75 was extremely high and out of all proportion to the rental value of the flat for two days for any ordinary purpose. It was proved that windows to view the Royal coronation procession were to be let and there was an announcement in the window of this flat so that the defendant was induced by that announcement to apply to the house-keeper and to enter into the contract. The learned Judges, while pointing out that the general rule is that the Court will not imply any condition in a contract except in cases of absolute necessity, and that a buyer under a contract took the risk of a performance of the contract being rendered impossible in unforeseen circumstances, went on to say,

> "that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened."

They therefore held in the peculiar circumstances of that case that since it was impossible to view the coronation procession the contract was unenforceable. The learned Judges referred to and distinguished a case in which a cab had been hired to take a person to the Derby. The races did not take place; but it was nevertheless held that the contract was enforceable. We are unable to say in this case that the foundation of the contract was that these goods should be re-sold by the defendants to their clients in Australia. The learned advocate for the appellants has referred to *Sannidhi Gundayya* v. *Subbayya*[1] and to *Kunjilal Monohardas* v. *Durga Prosad Debi Prosad*[2], in which a person who undertook to send rice by rail found performance impossible because of restrictions placed by the Government during the last war on the sending of goods by rail. It was found that the vendor had made every attempt to despatch the goods, but had failed. Those cases have no application at all to the case now under consideration; because the contracts were there impossible of performance and section 56 of the Contract Act would therefore directly apply. If the contract, as we are satisfied it was, was merely to send goods to Madras, then that contract could be fulfilled; and the plaintiffs were at all times ready and willing and able to send the goods there.

The plaintiff claims damages because the cancellation of the contract made it impossible for him to earn the profits he had reason to expect by the execution of the contract. It would have been foolish for the plaintiffs to have continued with the contract, manufactured the goods, and then to have attempted to sell them in the open market; for the goods were made to order to the specifications furnished by the defendants, and there was no guarantee that the plaintiffs would be able to realise even the cost price of manufacture had they made them and attempted to sell them. It is argued that damages must nevertheless be estimated on the difference between the contract price and the market prices prevailing for such goods on the date when they should have been delivered. *Millett* v. *Van Heek & Co.*[3] has been quoted in support of this contention. The contract there under consideration was one for the sale of cotton waste, the marketability of which was never in question. The only question before the learned Judges was whether damages were to be based on the difference between the contract price and the market rate on the date of breach, or on the difference between the contract price and the market price on the date of delivery. The question

1. (1926) 51 M.L.J. 663.
2. (1919) 24 C.W.N. 703.
3. (1921) 2 K.B. 369.

whether damages could be claimed on the basis of anticipated profits was not considered. A case much nearer to that which we are now considering is *Vic Mill, In re*,[1] where certain articles of machinery were ordered and subsequently cancelled. It was there held that,

"where there is a contract for the sale of goods to be made to order by the vendor and a breach of contract by the purchaser's refusal or inability to accept the goods, the measure of damages is the profit which the vendor would have made if the contract had been carried out."

It seems to us that it is impossible to calculate the damages by any means other than that suggested by the plaintiffs. There was no fixed date of delivery. The evidence shows that the goods were to be sent in consignments from time to time at the discretion of the plaintiffs on any dates between June and August. We do not know whether goods made to suit the tastes of clients in Australia would have had any marketable value in India; and if so, what prices the goods were likely to have fetched. The above decision was affirmed in appeal in *Vic Mill, Ltd., In re*[2].

If we are to estimate the damages by the loss of profits, then the further question is the percentage of the contract price which should be awarded. The plaintiffs, as we have said, claim 15 per cent. regarding which the learned Subordinate Judge said:

"In the circumstances of the case, one could hardly be better than being arbitrary. But it appears to me reasonable to hold that, to award ten per cent. on the nett value of the goods (had they been manufactured) . . . would be just compensation to the seller."

If we are going to put an arbitrary valuation on the probable profits, then we think 10 per cent. is too high. The prices charged by the plaintiffs were 20 per cent. less than the retail price, which would mean that they were estimating a difference of 35 per cent. between the cost price and the retail price. That is certainly much too big a difference. We feel that it is most unlikely that the plaintiffs would have sought to make a larger profit than 7½ per cent. on this contract. The appeal is allowed to that extent.

The memorandum of cross-objections by which the respondent seeks to have the rate of profits raised from 10 per cent. to 15 per cent. is dismissed with costs.

The plaintiffs will be given their proportionate costs in both the Courts.

V.S. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

The Province of Madras, represented by the Collector of East Godavari .. *Appellant**

v.

Sri Rajah Uppalapati Suryanarayaneswara Jogi Jagannadha Raju Garu and another .. *Respondents.*

Alluvion and diluvion—Lanks in Godavari river—Re-formation—Right of previous owner of land, when completed—Declaration of right—Ownership of bed of river—Test of navigability.

Where the process of formation in the river Godavari consisted ordinarily in the rise of a sand-bank owing to the shifting of the river-bed by floods, the planting of the sand-bank with reeds, the interception of silt by the reeds grown on the sand and the gradual formation of cultivable land which would be considerably above the water level at all seasons except during high floods,

Held, that until the soil had been deposited so as to raise the bank above the ordinary level of the water there was no question of any completed title by lateral accretion to the land to which the sand-bank was attached. If however the sand-bank was a re-formation of land formerly owned and washed away the owner could be presumed to have retained his title in the site of the land he formerly occupied, and when it re-appeared, even though the re-formation was incomplete, he was entitled to a declaration of his right thereto,

1. (1913) 1 Ch.D. 183. 2. (1913) 1 Ch.D. 465.

*Appeals Nos. 58 and 441 of 1942. *5th April*, 1944.

provided the re-formation was identifiable with the original land and there was no abandonment of his right therein.

The Crown's ownership of the bed of a river will be presumed if the river is either tidal or navigable. In deciding the question of navigability of a river in a case of dispute as to a lanka in an estate, the navigability should be decided with reference to the conditions prevailing at the time of the grant. Where the river is shown to have been then navigable, the fact that the volume of water flowing in the stream was since diminished by artificial erection of dam works and that it was thereby rendered not navigable during certain portions of the year will be immaterial.

Appeals against the decrees of the Court of the Subordinate Judge of Cocanada (Additional Judge), dated 23rd June, 1941, in O.S. Nos. 26 and 27 of 1939 respectively.

The Government Pleader (*K. Kuttikrishna Menon*) and *A. Rama Rao* for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*), *V. Govindarajachari* and *K. Venkatarama Raju* for Respondents.

The Court delivered the following

JUDGMENTS: *Wadsworth, J.*—These two appeals arise out of suits brought by the proprietors of the Gopalpur estate to establish their right to two lankas situated in the bed of the Vasishta branch of the river Godavari. The major appeal A.S. No. 58 of 1942 relates to what is alleged to be a re-formation of or accretion to, the Balaramuni lanka adjacent to the zamindari village of Udumudi. This lanka lies between the seventh furlong of the 24th mile and the fifth furlong of the 25th mile, according to the mileage on the left bank of the river, and it is about thirty miles from the sea. A.S. No. 441 of 1942 relates to the Bellampudi lanka situated between the 28th mile and the sixth furlong of the 28th mile that is to say, lower down the river. The evidence is to a large extent common in both appeals and the general questions arising are also common. I will deal first with the major appeal A.S. No. 58 of 1942 and thereafter consider the special features of the Ballampudi case.

The village of Udumudi belonging to the Gopalpur estate is situated on the left bank of the Vasishta Godavari more or less opposite to two Government villages, the northernmost being Nadupudi and the southernmost Pedamallam. The river flows roughly north to south. The mileage along the banks of the river is reckoned from the Dowleswaram anicut which goes right across the river Godavari just before the various branches of the delta divide. The land claimed by the Gopalpur estate consists of a roughly triangular island with its apex in the south-eastern corner and its eastern side running more or less parallel to and within a furlong of the eastern bank of the river. This island consists of a central portion which is now under cultivation and an outer fringe of sand planted with *nanal* or reeds, the usual procedure in reclaiming a sand-bank from the river being to plant reeds to assist the deposit of fertile silt.

The island claimed by the plaintiffs lies roughly north of the site of the Balaramuni lanka as located in the earliest plan we have on record, namely, the survey of 1863. To the north of the site now in dispute there was in 1863 another lanka called Merka lanka. In 1863 the northern portion of the Balaramuni lanka belonged admittedly to the Gopalpur estate except for a small strip on the western side which was attached to the Government village of Nadupudi situated on the western bank of the river. The whole of the southern portion of this Balaramuni lanka was in 1863 attached to the Government village of Pedamallam which is also situated on the west bank of the river. Similarly with the Merka lanka, the southern portion of the lanka was attached to the estate village of Udumudi but there was a strip to the west of this which appertained to the Government village on the western bank. We do not know on what principle this division of the lankas, which lie almost entirely in the eastern half of the river, was made. The original grant of the Gopalpur estate is not produced. The survey of 1863 does not indicate that any portion of the bed of the river, apart from

these islands was attached to the Gopalpur estate. The position, therefore, in 1863 was that both to the north and to the south of the area now claimed to be part of the Gopalpur estate there were islands owned partly by the Government and partly by the estate, the portions belonging to the estate being those portions adjacent to the area now claimed. It may be mentioned that the extreme northern portion of the area now claimed actually overlaps to a small extent the southern extremity of the Udumudi Merka lanka belonging to the Gopalpur estate as it existed in 1863.

We know nothing about the state of the river between 1863 and 1878. In 1878 however the Gopalpur estate was under the Court of Wards and a survey was made of the lankas belonging to that estate. There was also a land register prepared and with the help of the rough plans and the register the dimensions and shape of the lankas and the position of the individual survey numbers therein can be fairly accurately fixed. Exs. A series are the plans prepared in the Court of Wards survey. They are not drawn to scale; but the measurements, including a limited number of diagonal measurements, are given, so that it has been possible to plot this survey to scale. Ex. MMM is a plan drawn to scale of the Balaramuni lanka as it existed in 1878. It is clear from this plan that the Balaramuni lanka had extended in a northerly and easterly direction so as to comprise nearly double the area which fell within the Udumudi village in 1863. There was also an extension of the Merka lanka in a southerly and easterly direction. The effect of the accretions to these two lankas in relation to the present suit claim is clearly illustrated by a combined plan which has been prepared by the Lankas Deputy Surveyor at the instance of the Court during the hearing of this appeal. This plan has been exhibited in appeal as Ex. XXXIX. It will be seen from this plan that whereas no part of the Balaramuni lanka in 1863 overlapped the site now claimed by the Gopalpur estate, a considerable portion of the accretions to this lanka overlaps the south-west of the site now claimed. Similarly, the accretion to the Merka lanka at the time of the Court of Wards survey of 1878 extends very considerably the area of this lanka which coincides with the northern portion of the area claimed by the plaintiffs. Without taking actual measurements it would appear that between one-third and one-half of the site now in suit coincides either with the Balaramuni lanka or with the Merka lanka as they existed in 1878. It seems to me that there can be no question regarding the title of the estate to the accretions surveyed in 1878 as part of these two lankas falling within the estate. No doubt the survey may not strictly bind the Government, though it was presumably conducted by a Government Surveyor at the instance of the Estate Collector. But clearly the results of this survey were embodied without question in the land registers of the estate and it can be demonstrated that for many years the estate without objection from the Government treated the accretions to the two lankas as its own property, collecting revenue and auctioning those portions of the lankas which were not given on patta.

There is no plan of the river between 1878 and 1895, but the estate registers, Exs. DDD-14, UU, Z-1 and C show the stages by which the northern and eastern portions of the Balaramuni lanka were washed away in successive floods. By the time of the survey of 1895 commonly known as the "Water Tax or Mamool Wet Survey" embodied in the plan Ex. II, the actual extent of the Balaramuni lanka had fallen from approximately 119 acres, which was the extent in 1878, to a little over 38 acres. By 1895 the strip on the west of the lanka belonging to the Government village of Nadupudi had disappeared into the river. We are not of course concerned with the southern portion of the lanka which belonged to the Government village Pedamallam. The next plan is the River Chart Survey undertaken by the Government of India in 1903, the map of which is Ex. IV and the corresponding register Ex. KKK. This plan shows that the portion of the Balaramuni lanka shown as cultivable land belonging to the Udumudi village had been still further reduced by erosion in the north-eastern corner, but a sand-bank had

formed extending a considerable distance to the east and the west of the lanka. In all these early plans there is a channel of the river separating the Balaramuni lanka both from the Merka lanka to the north and from the main bank of the river to the east and the width of this channel which had decreased between 1863 and 1878 showed a tendency to increase in the later period. By 1903 the cultivable extent of the Balaramuni lanka in Udumudi village had fallen to 24.34 acres.

After 1903 there is a gap in the evidence until 1920. An attempt has been made on behalf of the estate to contend that Ex. XVI, a plan which shows a large island more or less over the site now claimed by the plaintiffs, belongs to the year 1919. The evidence is not at all clear. The plan bears at its foot the engineer's signature with a date in 1920, but at the top of the plan there is the draftsman's signature of July 1929. The plan was treated in the lower Court as a plan of 1929. A comparison of the conformation of the land with the plans of the years preceding and succeeding 1919 makes it very unlikely that this was a plan of that date. There is no oral evidence to show when or how this plan was prepared. The learned Government Pleader has suggested that this is one of a series of lanka survey plans which were usually prepared by inserting in a skeleton plan drawn up at an earlier date by the Public Works Department details roughly demarcated as a result of the Lanka Inspector's visits from time to time. It seems most probable that this is the correct explanation of Ex. XVI and that the date of the Superintending Engineer's signature is the date of the preparation of the skeleton plan of the river, while the details regarding the formation of the lankas were inserted in 1929, the date of the draftsman's signature. It is, however, regrettable that this point was not made clear by evidence in the lower Court. We may take it for the purpose of this appeal that Ex. XVI is a plan prepared in 1929 and is therefore of little importance since the litigation started in 1931.

Ex. V is the Lanka Inspector's plan of 1920-21. It is common ground that at or about this time the whole of the cultivable soil of the Balaramuni lanka had been washed away. Ex. V shows nothing but an irregular sand-bank in the southern portion of the site formerly occupied by the Balaramuni lanka. Proceeding northwards there is a channel with a small island, then roughly in the middle of the site now claimed by the estate we find a large, roughly quadrilateral sand-bank extending east to west. This is separated from the remains of the Merka lanka and from the bank of the river by a channel which runs first to the east, then southwards, cutting off the various sand-banks from the main river. Some doubt is thrown on this plan in so far as it shows a flowing channel between the remains of the Balaramuni lanka and the sand-bank to the north of it. The karnam has deposed that there is no water in this channel. It may well be that this was a shallow depression which would be dry during the low water months and would contain water at other times of the year. The fact, however, remains that the whole of the Udumudi Balaramuni lanka had been washed away except for the existence of a sand-bank, presumably submerged when the river was high, and there was nothing in the nature of cultivable land in the Central sand-bank, part of which corresponds to the area now claimed by the plaintiffs.

The lanka now claimed by the plaintiffs seems to have begun to form as cultivable land somewhere about the year 1924. At any rate, Ex. XX, the survey of 1927, with the corresponding register Ex. VIII, shows a large survey number 1 with a sub-division 1|2 in which were patches of cultivation. This cultivation cannot be precisely located; but it would appear that the whole block overlaps part of what was originally the Merka lanka and part of what was originally the Balaramuni lanka; but it does not appear that there was at this time any channel flowing to the south of this block of cultivation. If Ex. XVI has been correctly dated in the year 1929, it would show that the block of cultivation by this time was in the centre of the island, that it was surrounded by *nanal* or reeds, and

that the whole formation extended as far as the boundary between Pedamallam and Udumudi, there being a channel separating it on the north from the Merka lanka and on the east from the main river bank. Finally, we have the plan attached to the encroachment notices which led to the suit showing an occupation roughly triangular in shape extending in a northerly direction so as to overlap slightly the original area of the Merka lanka, but extending in a south-easterly direction to a point some distance to the north of the boundary between Udumudi and Pedamallam and not overlapping the original Balaramuni lanka as it was in 1863.

It will be gathered from this summary of the documentary evidence that the area now claimed by the estate is a formation arising from the bed of the river at some time after 1920, assisted perhaps in its formation by the existence of sand-banks which may be the remains of the pre-existing lankas; but certainly it was not a lateral accretion to any existing land which was definitely above the normal high water mark at the time. It will be gathered also that this area now claimed by the plaintiffs lies partly over the site which was an accretion to the Balaramuni lanka in the year 1878, partly over a site which has always, so far as we know, been situated in the bed of the river, and partly over the site which in 1878 was attached to and treated as a cultivable portion of the Merka lanka in the north.

Now the claim of the estate to this formation is based on various contentions. Firstly, it is contended that the whole of the plot now in dispute was demarcated as part of the Gopalpur estate with field numbers 548 and 587 to 597. This statement is not quite correct, for survey number 587 is shown in the Court of Wards survey as "Godavari river"; and it is difficult to see how the action of the surveyor in giving to a portion of the river a number in the survey of the village describing it as "river", could operate to grant the bed of the river to the estate which owned the village, in the absence of evidence that the original grant included any portion of the bed of the river. Similarly the plaintiffs contend that the whole of the disputed locality was surveyed as part of the estate in 1895 and that it has been recognised as part of the estate and cannot therefore be claimed by Government. It is contended that the disputed lanka has been in the continuous possession and enjoyment of the Gopalpur estate and that the estate is entitled to it either as an accretion to or a re-formation of land belonging to the estate. The plaintiffs also assert that the Vasishta Godavari river is not a tidal and navigable river in the disputed locality and that the bed of the river up to the middle of the stream belongs to the plaintiffs as owners of the land on the left bank. The plaintiffs therefore claim not merely the cultivated area, but also the sand shoals around it and ask for a declaration that the whole locality belongs to them and they also allege that even if the Government was once entitled to the land, it has lost it by adverse possession. The declaration given by the lower Court is that the plaintiffs are the owners of Balaramuni lanka of 93 acres 37 cents and also of about 100 acres of sand shoals surrounding it "as per plan attached to the decree". There is no plan attached to the decree amongst the records in Court and there are no materials upon which the location of the sand shoals decreed to the plaintiffs can be precisely fixed.

The first question to be decided is whether the bed of the river belongs to the Government. We are not able to accept the contention of the learned Government Pleader that this question is governed by *res judicata* as a result of the decision in S.A. No. 785 of 1942 a case relating to a different portion of the same river. A great deal of time has been spent in the lower Court in considering the question whether the Vasishta Godavari at the disputed point is navigable throughout the year. The evidence seems to show that in times of low water, navigation is carried on with extreme difficulty by utilising the tide and making bunds and excavations in order to bring up boats capable of carrying cargoes. Light boats of very shallow draught such as are used by fishermen seem to ply through-

out the year. It seems to me, however, having regard to the known facts regarding the river, that the question of navigability, if it arises at all, should not be considered with reference to conditions as they exist now but with reference to conditions as they existed at the time of the grant. If at the time of the grant the bed of the river cannot be deemed to have been conveyed to the Zamindar, any doubt regarding the navigability of the river in present condition would not operate, so as to convey half the bed of the river to the zamindar. In or about 1852 a great irrigation work was constructed consisting of a dam or anicut right across the river at Dowleswaram, some twenty-five miles above the disputed locality, and an elaborate series of canals and channels, whereby water was intercepted and distributed throughout the delta. It is not disputed that the river Godavari above this dam is navigable throughout the year. The dam however intercepts the whole of the low level water which flows towards the sea after the floods have disappeared. The flood season is normally from the end of June to about the end of September. The extreme low water season is during the months of April to June. During the latter period the only water which flows in the Godavari river below the Dowleswaram anicut consists of percolation water, drainage water and such water as may be ascribed to springs. Seeing that the river is navigable throughout the year above the Dowleswaram anicut, it is reasonable to infer that before the anicut was constructed the main branches of the river, of which the Vasishta is one, would also have been navigable throughout the year.

The question whether the river is tidal at the disputed locality seems to me also fairly clear though I do not agree with the learned Subordinate Judge who has held that the river is not tidal. Ex. XXVI is a statement of tidal readings taken by the Public Works Department at the fifth furlong of the 26th mile during the month of June, 1937. This shows very considerable differences of level at different states of the tide. Thus on 6th June there was a rise and fall of nearly four feet. On the 13th June, the rise was three feet. In the middle of the month the differences are very slight. Towards the end of the month we again find differences of two to three feet. Quite clearly the Vasishta Godavari is subject to the influence of tides at this point which is roughly one mile below the area under consideration in A.S. No. 58 of 1942 and about two miles above the area under consideration in A.S. No. 441 of 1942. The Government expert D.W. 4 definitely states that the effects of the tide are noticeable up to Gopalpur, which is six miles above the suit locality. The plaintiff's expert, P.W. 25, admits that the river is tidal within twenty-five miles of the mouth and that if the bed has been scoured out the tide might come up about six miles further. The report of the Commissioner, Ex. GG, is to the effect that there is an ebb and flow of the tide at the disputed locality though the action is not sufficient to enable boats laden with cargoes to pass freely up and down the river in seasons of low water. On this state of the evidence it seems quite clear that the river at the point now in dispute is tidal and that it must be deemed to have been continuously navigable at the time of the grant to the plaintiffs. It follows therefore that the bed of the river belongs to the Crown.

This leads to the further question, what constitutes the bed of a river? This is a question which is not always easy to answer and two attempts to answer it have been frequently adopted by the decisions. In the case of *Alabama* v. *Georgia*[1], the Supreme Court of the United States of America defined the bed of a river as "that portion of its soil which is alternatively covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshes of the winter or spring, or the extreme droughts of the summer or autumn". This definition has been accepted by the English Courts as one possible definition for the guidance of the Courts, that is to say, the criterion is whether the land in question is situated

1. 16 Lawyers Edition 556 at 560.

within the area over which the river will flow in a normal condition and which will sometimes be covered and sometimes left bare according to the quantity of water coming down the river. Another criterion which is perhaps more applicable to conditions in India is suggested in the decision of Romer, J., in *Hindson* v. *Ashby*[1]. The learned Judge says "I think that the question whether any particular piece of land is or is not to be held part of the bed of a river at any particular spot, at any particular time, is one of fact, often of considerable difficulty, to be determined, not by any hard and fast rule, but by regarding all the material circumstances of the case, including the fluctuations to which the river has been and is subject, the nature of the land, and its growths and its user." The learned Judge quotes a decision of the Supreme Court of the United States where emphasis is laid upon the appearance of the soil, its vegetation and so on, when deciding whether a particular piece of land is part of the bed of a river. This decision in *Hindson* v. *Ashby*[1] came up in appeal [(1896) 2 Ch. 1] and the principles upon which the trial Court had proceeded were affirmed though the decision was reversed on facts.

Now applying these two tests to the present case we have to consider whether a mere sand-bank, visible when the water is low, submerged when the water is high, is to be regarded as part of the bed of a river or as an island capable of ownership by a person who is not the owner of the bed of the river. It is of course impossible to draw a hard and fast line between that which is a sand-bank still forming part of the river-bed and that which is an accretion or re-formation belonging to the owner of the land to which the accretion is attached or of the soil formerly existing at the point of re-formation. The process of formation in the river Godavari consists ordinarily in the rise of a sand-bank owing to the shifting of the river-bed by floods, the planting of the sand-bank with reeds, the interception of silt by the reeds grown on the sand and the gradual formation of cultivable land which will be considerably above the water level at all seasons except during high flood. It seems to me that until this last stage is reached, that is to say, until the soil has been deposited so as to raise the bank above the ordinary level of the water, there can be no question of any completed title by lateral accretion to the land to which the sand-bank is attached. If, however, the sand-bank is a re-formation of land formerly owned and washed away, the owner may be presumed to have retained his title in the site of the land he formerly occupied and, when it re-appears, even though the re-formation is incomplete, he is entitled to a declaration of his right thereto, provided that the re-formation is identifiable with the original land and there has been no abandonment of his right therein. The leading cases cited before us on this subject are *Lopez* v. *Muddun Mohan Thakoor*[2], *Hurasahai Singh* v. *Syed Lootf Ali Khan*[3], *Maharajah of Dumraon* v. *Secretary of State for India in Council*[4] and *Rani Hemanta Debi* v. *The Secretary of State for India in Council* and *Sri Sundari Debi* v. *The Secretary of State for India in Council*[5].

There has been some discussion before us of the difficult theoretical question which arises when the bed of a river is increased by the gradual and imperceptible process of diluvion and subsequently land is re-formed on the site washed away. Will the accession to the bed of a river by this process of diluvion, which is the inverse process to that of accretion, prevail over the right of the former owner to retain ownership of the site which was his at any rate until the river washed away the upper soil? I do not, however, find it necessary to propound an answer to this question for it seems to me that it does not arise on the facts of the present case if properly viewed. We know that portions of the site now in dispute were formerly occupied by the Merka lanka in the north and the Balaramuni lanka in the south, both of which were at these points recognised as appertaining to the Gopalpur estate. We know that the Balaramuni lanka was extensively eroded

1. (1896) 1 Ch. 78.
2. (1870) 13 M.I.A. 467.
3. (1874) L.R. 2 I.A. 28.
4. (1927) I.L.R. 6 Pat. 481.
5. (1906) 3 C.L.J. 560 (P.C.).

during the period from 1878 to 1903. There is, however, no material for holding that this erosion was a gradual and imperceptible process. In fact so far as the registers are available it would appear that extensive blocks of land were washed away in particular floods, that the extent so washed away was duly recorded and remissions of revenue were granted in respect thereof. In these circumstances it cannot in my opinion be said that the process of erosion was gradual and imperceptible so as to provide a basis for the argument that the title of the former owner to these sites so washed away has been extinguished..

Now summing up the position in the light of the evidence and of the law as summarised above, it seems to me clear that at the time when the suit lanka was formed there was no existing land of the Gopalpur estate to which it can be deemed to be a lateral accretion. Such sand-banks as remained appear to have been, so far as the evidence goes, mere elevations in the bed of the river not capable of effective occupation, at any rate in the years 1920-21. We are not therefore concerned with any question of lateral accretions. I may, however, observe that the attempt of the learned Government Pleader to dispute the title of the estate to the cultivable lands surveyed as part of the estate in 1878, on the ground that the process of gradual accretion is not established, must fail; for it seems to me that the recognition of the estate's right to these lands as accretions must have been undoubted, in view of the treatment of these lands both at the time of the survey and subsequently. The right of the estate to the cultivable lands demarcated as part of the estate in 1878 being established, it seems to me to make no difference whether the estate's right depended on an original grant or an accretion to that grant. The estate was the full owner of the cultivable lands shown in the plans and registers of 1878. Those lands were to a large extent washed away by a series of floods. There is nothing to show that the Government as the owner of the bed of the river acquired title to the portions so washed away. To the extent therefore to which these lands belonging in 1878 to the estate can be shown to have re-formed as part of the area now in dispute, clearly the title of the Gopalpur estate must prevail. To the extent to which the land now in dispute cannot be shown to be a re-formation of either Balaramuni lanka or the Merka lanka it must, in my opinion, be deemed to be a new formation in the bed of a river belonging to the owner of the bed, namely, the Government. The plan which has been prepared at our instance Ex. XXXIX shows the extent to which the two lankas as they existed in 1878 belonged to the plaintiffs' village of Udumudi and overlap the area now claimed by the plaintiffs. The title of the plaintiffs will be declared to the land and to the bed of the river included within the red lines marked on this plan and the plaintiffs will be entitled to a refund of so much of the penal assessment as has been levied with reference to land included within these red lines the amount to be determined by the lower Court. The appeal and the suit having succeeded only in part I think it proper that both parties should bear their own costs throughout.

I will turn now to the evidence regarding the Ballampudi lanka which is the subject-matter of A.S. No. 441 of 1942. The site claimed by the plaintiffs consists of 43·85 acres. The plaint definitely proceeds on the basis that this area is a re-formation of a lanka formerly belonging to the estate and identifiable with land that originally belonged thereto. It is also contended that if there be any excess in area it would still be part and parcel of this re-formed lanka or that in any view of the case it would be a lateral accretion to the reformed lanka which belonged to the proprietors of the Gopalpur estate. There is no contention that the disputed land is a lateral accretion to the bank of the river belonging to the proprietors. An attempt has been made to argue the case on the footing that the land now disputed was a lateral accretion to the strip of land bordering the bank which clearly belongs to the plaintiffs. On the facts I doubt very much whether this would be established; but it would be most unfair to require the defendant to meet such a case which is not, in my opinion, suggested either in the plaint or in the issues.

The Ballampudi lanka has a much shorter history, so far as documents go, than the Balaramuni lanka. The survey of 1863 shows no formation of any kind in the area in dispute and no accretions to the left bank of the river. The Court of Wards Survey in 1878 is also negative. At the time of the Mamool Wet Survey in 1895 there was still no lanka and the relevant survey numbers on the river bank are given as Nos. 88 to 90. In 1903 the River Chart Survey Exhibit VI shows two narrow strips Nos. 93 and 92, adhering to the riparian numbers corresponding to those already mentioned. It is conceded that these two numbers, 93 and 92, belong to the zamindar. To the west of these two numbers there was an extensive area, No. 89, described as "Sand" with description "dubbu grass" in the accounts. The accounts also show that originally the word "zamindar" was written against this number but was subsequently scored off. No creek is shown between this No. 89 and the two riparian accretions 92 and 93. There is no documentary evidence at all for the interval between 1903 and 1920. In 1920 the Lanka Inspector's survey shows a narrow strip of cultivated land adhering to the eastern bank, similar in shape and location to the two numbers 93 and 92 found in Exhibit VI. To the west of this narrow strip there is a creek which is shown as containing water for about half its length and below that there is marked what is described as a low *paya* blocked up. A *paya* is a channel, but not necessarily one which would contain water in the dry season. To the west of this creek and dry channel there is marked a sand shoal. The 1927 plan Exhibit XXVII shows a similar cultivated strip along the bank such as is found in the earlier plan. To the west of that in its northern portion is a formation on which were growing *nanal* and grass, below which there is shown a channel running east and then south along the edge of the cultivated strip cutting off another formation which is described as "*nanal* or reed." The application for permission to cultivate thirteen acres situated in the neighbourhood of the third, fourth, and fifth furlongs of the 28th mile is accompanied by a sketch Exhibit G-1. This cultivable area would correspond to the land separated in 1927 by a channel from the *nanal* growth in the river-bed proper. This sketch shows *nanal* in the space between the cultivated strip and the river-bed. In 1930 the Government issued an encroachment notice to which a plan Exhibit XXIII is attached. This plan shows an area of 37.35 acres in the occupation of the zamindar, situated between the first furlong of the 28th mile and the sixth furlong of the 28th mile, separated by a silted up channel from the narrow strip adhering to the river bank. The documents prior to 1903 on which the lower Court seems to rely, Exhibits M, N, O, P and Q seem to have no reference whatever to the area now in dispute. They may well refer to the narrow strip adjoining the river bank to which the title of the zamindar is admitted.

The facts to be deduced from the plans are as follows:—Before 1903 there was no formation at all in the area under consideration. In 1903 there was an extensive sand-bank on which there was grass, adjacent to the strip which the estate had brought under cultivation. There is no evidence that this sand-bank ever became an effective accretion to the land of the estate or that it was ever cultivated or brought under the occupation of the estate. We do not know anything about the later history of this area until after 1920 when a series of plans indicates the formation first of a sand shoal, then of land in process of reclamation and finally of a reclaimed area, separated from the strip adjoining the river bank by what was apparently always either a channel or silted up water-course. On these facts the only inference possible seems to be that the area claimed in this suit is a vertical formation, not identifiable as a re-formation of any land formerly belonging to the estate. As I have already stated, it is not claimed as an accretion to the bank, but I am of opinion that on the facts proved, even if such a plea could be taken, it would have to be found that this land has not been shown to be an accretion to the riparian land owned by the estate. The tidality of the river at this point is even less in doubt than that of the river higher up dealt with in the other appeal. Since this land must be regarded as a vertical forma-

tion arising in the bed of the river and since the bed of the river belongs to the Government, the plaintiffs cannot claim this land. This appeal, A.S. No. 441 of 1942, is allowed with costs throughout and the suit is dismissed.

We fix the advocate's fees as Rs. 750 and Rs. 375 for junior in A.S. No. 58 and at Rs. 400 and Rs. 200 for the junior in A.S. No. 441.

Patanjali Sastri, J.—I agree. In view, however, of the importance of some of the questions argued before us I desire to add a few observations. As my learned brother has narrated the relevant facts and reviewed the material evidence in his judgment which I have had the advantage of reading, it is unnecessary to go over the same ground here.

The larger lanka which is the subject-matter of A.S. No. 58 of 1942 is claimed by the respondents mainly on two grounds, namely, (1) as the Vasishta is neither tidal nor navigable at the locality in question, they, as riparian proprietors, own the bed of the river *ad medium filum aquae* which includes the land in dispute and (2) even if the river is held to be tidal or navigable and the entire bed is in consequence vested in the Government, the appellant herein, the new formation is an accretion to or a re-formation *in situ* of certain old lankas admittedly appertaining to the respondents' Village Udumudi which lies on the eastern bank of the river subtending the formation. The appellant contests both these grounds and the question is whether they are well-founded.

The Court below has found that the river is neither tidal nor navigable at the point. But our examination of the evidence shows that it is tidal, though it is not navigable in its present state during the dry season (June to September) as the construction in or about 1852 of the *anicut* at Dowleshwaram 25 miles higher up diverts the waters of the stream in those months into a net-work of artificial canals and channels for irrigating the delta area. It is admitted on behalf of the respondents that, in spite of the construction, the seepage and drainage water flowing down the river below the dam is of sufficient volume and depth to render it navigable even during the summer for about twenty-five miles from the mouth of the river. The lanka now claimed is situated six miles higher up. It is not disputed that above the *anicut* the stream is navigable throughout the year. In these circumstances, it is argued for the appellant that, on the question of ownership of the bed of the river, tidality and not navigability is the determining factor, and that, even if navigability in the sense of being navigable throughout the year (see *Secretary of State for India* v. *Venkatanarasimha Naidu*[1] and *Subbarayudu* v. *Secretary of State for India*[2]) were held to be the basis of the Crown's title, it must have reference to the natural state of the stream, and the cross-bunding cannot affect the character of the river as a navigable stream or the title of the Crown. The respondents, on the other hand, contend that in this country the ownership of the Crown in the bed of a river is determind by its navigability throughout the year, and that the ebb and flow of the tide at the point is immaterial. In my opinion, neither of these contentions in its extreme form making tidality or navigability the sole test is correct.

The true position would seem to be that the Crown's ownership of the bed will be presumed if the river is either tidal or navigable. It is well established in English Common Law that the bed of tidal waters vests *prima facie* in the Crown. The reason of the rule is thus explained by Farnham on Waters and Water Rights, Vol. 1, page 179:—

"The one unique feature of the sea is the tide. When, therefore, it was established that the King had title to the sea, it was an easy step to the conclusion that the sea went as far as the tide did, so that the King's title extended up the rivers as far as the tide flowed";

and he cites the *Banne case*[3] as saying that the reason why the King has an interest in such navigable river as high as the sea ebbs and reflows is because such river partakes of the nature of the sea. Indeed, the title of the

1. (1919) 11 L.W. 256.
2. (1927) 53 M.L.J. 868: I. L. R. 50 Mad. 961.
3. Davies Report 149.

Crown to the bed has been held in England not to extend further than the tide though the river may, in fact, be navigable even above that point. In *Hindson* v. *Ashby*[1] Lindley, L.J., said:

"There is no question here of any right upon the part of the Crown to the bed of the river, for at Wraysbury the river, though navigable, is not and never was tidal. Hale, de Jure Maris, Ch. iv."

Thus under the English Common Law the ownership of the Crown in the bed of a river ends and that of the riparian owners begins at the point where the stream ceases to be tidal, alike in navigable and non-navigable rivers. This limitation on the Crown's ownership of the bed has not always been accepted by the Courts in America where it is held in some cases that the bed of a navigable stream vests *prima facie* in the Crown even where it is non-tidal, such extension of the Crown's ownership being founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment. This view is vigorously criticised by Farnham who stresses the distinction between a public right and a public use, and points out that the public easement of navigation can well co-exist with the riparian ownership of the bed (Volume I, pages 247 and 248). The doctrine of the Crown's ownership of the bed of navigable but non-tidal rivers has, however, been recognised and given effect to by this Court in a recent decision in *Maharaja of Pithapuram* v. *Secretary of State for India*[2] where the earlier cases have been reviewed. However that may be, there seems to be nothing in the doctrine that the ownership of tidal waters is *prima facie* in the Crown which precludes its application to this country, and no authority holding it to be inapplicable to the conditions here has been brought to our notice. Reference was made to the observations at p. 543 in the recent decision already referred to as supporting the view that navigability alone is the test of the Crown's ownership of the bed and tidality is immaterial. After referring to the Privy Council decision in *Tarakdas Acharjee Chowdhury* v. *The Secretary of State for India in Council*[3], the learned Chief Justice who delivered judgment of the Court observed:—

"Neither in this case nor in *Haradas* v. *The Secretary of State for India in Council*[4] was any suggestion made that the tide is a factor in deciding the ownership of the bed of a public navigable river in India."

I do not read this passage as laying down that tidality can be no test at all in deciding the ownership of the beds of rivers in India. All that was apparently meant was that the tide was not an essential factor in determining title to the bed of a public navigable river in this country. The learned Judges did not have to consider the question of the ownership of the soil in the converse case of a tidal but non-navigable stream. I am of opinion that the title to the bed of the Vasishta at the locality in question where the tide ebbs and flows must be taken *prima facie* to belong to the Crown even though the river in its present state is not navigable there throughout the year.

The other branch of the appellant's contention also seems to me to be well-founded. Assuming navigability to be the sole basis of the Crown's ownership of the bed as suggested for the respondents, can it be said that the Vasishta is not navigable merely because the anicut intercepts almost the entire waters of the stream so as to render navigation difficult without artificial aids for some distance below during the summer months. The navigability of a river, I apprehend, must be judged with reference to its natural state, and if it was navigable before the construction of the dam and the title to the bed was in the Crown, it is difficult to see how such title could be divested merely because the cross-bunding has reduced the volume of water flowing down the stream below the construction, any more than the title of a riparian owner could be divested by the river being made navigable by deepening the bed by artificial means. The Crown's title must be

1. (1896) 2 Ch. 1 (9).
2. (1942) 1 M.L.J. 344: I.L.R. (1942) Mad. 532.
3. (1935) 69 M.L.J. 171 (P.C.).
4. (1917) 26 C.L.J. 590 (P.C.).

taken to continue unless the respondents are able to show that such title was lost by grant or adverse possession of the bed, and there is no room for applying the principle of riparian ownership extending up to the middle thread of the stream. No question of adverse possession was raised before us, and indeed no continuous possession of any portion of the bed could have been possible in such a fluctuating river which from time to time shifts its course encroaching, submerging and receding owing to the action of the mighty floods which flow down the stream. As for grant by the Crown, at the time of the permanent settlement of the respondents' estate in or about 1803, the river must undoubtedly have been navigable throughout the year at the locality in question, and there is no presumption that a grant of lands on the banks of a tidal or public navigable river passed title to the bed *ad medium filum*. The respondents have not produced their *sannad* which must be in their possession, and there is no satisfactory evidence to show that the river-bed where the suit lanka has sprung up was included in the respondents' estate.

Turning next to the other ground on which the respondents' claim was sought to be sustained before us, *viz.*, accretion and re-formation *in situ*, the principle of accretion has thus been explained by their Lordships of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor*[1]:

"Where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land."

In *Secretary of State* v. *Raja of Vizianagaram*[2], their Lordships observe that in dealing with the great rivers in India, it is necessary to bear in mind the comparative rapidity with which formations and additions take place and that the words "slow and imperceptible" used in the earlier decisions are only qualifications of the word 'gradual' and must be understood and applied with reference to the conditions of the country where the question arises. In the present case there is no clear evidence to show that the new blocks of land shown in the survey maps Exs. A series of 1878 to the north of the Balaramuni lanka and to the south of the Merka lanka adjoining the portions which admittedly belonged to the respondents, were formed by a process which can be said to be "gradual" even in the qualified sense explained by their Lordships. These blocks of land are not to be found in the survey map of 1863, and as we have no reliable evidence regarding the state of these old lankas between 1863 and 1878 when the new blocks appear to have come into existence, it is not possible to say that their formation was so gradual as to entitle the respondents to claim them as *accretions* to their old Balaramuni and Merka lankas. The maps Exs. A series, the land Register Ex. B and the plan Ex. MMM relating to the survey of 1878, however, indicate that these blocks adjoining the old lankas on the north and on the south respectively were treated as integral parts of these lankas and were surveyed and demarcated as appertaining to the Udumudi village. As the survey operations of 1878 were admittedly conducted by the officers of the Government at the instance of the Court of Wards who were then in management of the Gopalpur Estate during the minority of the proprietor, it is not unreasonable to infer that the new formations shown in the survey maps of 1878 were treated by all concerned as increments to the respondents' lankas and as such belonging to them. During the subsequent period, however (*i.e.*, from 1878 to 1895) we find that not only the new blocks referred to above but even considerable portions of the old lankas were washed away by the river, as the cultivation and other accounts of the estate show a steady dwindling of their areas. Here, again, it is not possible to say whether the irruption by the river was so gradual that the respondents could be said to have lost their title to the portions washed away on the principle of diluvion. Then followed a period during which the river began to throw up new formations again which, after vari-

1. (1870) 13 M.I.A. 467.
2. (1921) 42 M.L.J. 589: L.R. 49 I.A. 67: I.L.R. 45 Mad. 207 (P.C.).

ous intermediate changes in shape and extent, assumed by 1930 the form of the island now in dispute. This block is separated from the Balaramuni lanka on the south and from the Merka lanka on the north by *payas* or water-courses, and it does not adjoin the Udumudi village on the bank. It is thus clear that it cannot be regarded as a lateral accretion to any land belonging to the respondents, but must be regarded as an independent vertical formation in the bed of the stream. Title to it must therefore be in the Crown unless the respondents are able to establish by clear proof of identity that any part of it is a re-formation *in situ* of their old lanka lands washed away by the river.

The principle that land washed away but subsequently re-formed on its original site belongs to the original proprietor is well established (see *Maharaja of Dumraon* v. *Secretary of State for India in Council*[1]). Whether this principle is applicable only where the land is lost to the original owner by a sudden irruption of the river in which case the title of the original owner continues unless abandoned, or whether it applies also to cases where the original owners' title is lost by the gradual slow and imperceptible process of diluvion, we need not pause to enquire, as it does not appear on the evidence in this case that the encroachment was by such slow and imperceptible degrees as to destroy the respondents' title to the land submerged. The learned Government Pleader, however, argued that while the principle of re-formation *in situ* might be applicable to the extent to which the respondents' portion of the old Balaramuni lanka or the Merka lanka as shown in the survey map of 1863 could be traced into the island now in dispute and identified with any part of it, the principle could not be invoked in respect of the increments to these lankas shown in the plan of 1878. It is difficult to appreciate this distinction. When once these accretions are held to belong to the respondents, as I think they should be for the reasons already indicated, no logical differentiation can be made between the respondents' title to the original lankas and their title to the subsequent accretions thereto. Their title to both must, in quality and scope, stand on the same footing, and there would seem to be no reason why the respondents should be denied the benefit of the re-formation of the accreted land any more than the re-formation of the original nucleus. The learned Government Pleader has also urged that the principle is not applicable unless the new formation has clearly ceased to be part of the river-bed and has emerged out of the surface of the stream in a cultivable or usable state. It may be mentioned here that while the central portion of the island in dispute, is fit for cultivation and is actually cultivated, being covered by alluvial deposits, there is a wide fringe of sandy waste all around. It was said that these sand shoals are still part of the river-bed and that the respondents could not claim title to any portion thereof, even if such portion could be identified with the site of the old lankas washed away. Reference was made to the definition of river-bed in *Hindson* v. *Ashby*[2], where, dealing with a claim to a strip of land alleged to be an accretion to the land of a riparian owner, Romer, J., observed that the question whether any part of river-bed had lost its character as such and has accreted to dry riparian land was one of fact to be determined not by any hard and fast rule, but by regarding all the material circumstances of the case including the fluctuations of the river, the nature of the land, and its growths and user, an observation which was approved by the Court of Appeal in *Hindson* v. *Ashby*[3]. In this view, it was said, the surrounding sand shoals could not, by their very character and appearance, be said to have ceased to be part of the bed of the river in the ownership of the Crown. This may well be a material consideration if these portions were claimed as accretions; for accretion implies that a portion of the river-bed becomes the property of the adjoining owner by a process of gradual and imperceptible recession of the stream, and it is but common justice in such a case that the land claimed to have thus accreted should be shown to have definitely ceased to be part of the bed before the title of the owner of the bed could be said to have been lost. But the doctrine of re-formation *in situ* rests on the principle

1. (1927) 52 M.L.J. 655: L.R. 54 I.A. 156: I.L.R. 6 Pat. 481 (P.C.).
2. (1896) 1 Ch. 78.
3. (1896) 2 Ch. 1.

that the title of the original owner to the land washed away or submerged is not absolutely extinguished unless he has abandoned it but continues to remain in such owner, provided such land can be identified by boundaries, landmarks or otherwise, subject of course, to such easements of navigation or other rights to which the flow of water thereon may give rise. When the water has receded and the land re-appears again the original owner is held entitled to take the property if it can be clearly identified. This being the reason of the rule, it is difficult to see why it should be regarded as necessary that the land encroached upon by the river should be shown to have ceased to be part of the river-bed before it can be claimed by the original owner as his property. There is no question of recovering, in such cases, what did not originally belong to the owner. I am, therefore, of opinion that the respondents are entitled to claim such portion or portions of the island in dispute as can be proved to have formed on the ascertained site of their old lankas or of the accretions thereto shown in the survey plans of 1878.

The respondents' claim to the other block of land called the Bellampudi lanka is the subject of the connected appeal. The respondents' ownership of the bed to the middle of the stream has already been negatived. The only other ground of claim disclosed in respondents' pleading is an alleged re-formation on the site of an old lanka which originally belonged to them. There are no satisfactory materials to establish the identity of the new formation with the site of any old submerged lanka which once belonged to respondents. An attempt was, however, made before us to show that the land in dispute was an accretion to their riparian land. But no such case was put forward in the plaint, the reference to lateral accretion in paragraph 6 being obviously to "any excess in area" in the new formation. In cases of this kind it is essential that parties should be strictly confined to the case which they make in their pleadings, for claims based on accretion, on re-formation *in situ*, or on riparian proprietorship up to the middle of the stream, involve different considerations and require different media of proof. In *Sree Eckowrie Sing v. Heeralall Seal*[1], their Lordships of the Privy Council observed:—

"The plaintiffs must succeed or fail on their title to the land as alluvial. It is not competent for them now, the cause having been decided on this title to raise at the hearing of their appeal a different case, *viz.*, one simply of original ownership of the site of the lands re-formed. Had that been the case alleged, some defence might have been made, founded on the nature of a boundary river, the ownership of its soil, the character, sudden or gradual of the original loss of land, and the effect of change from such causes in the land itself on the ownership in the soil."

In the present case the respondents based their claim to the land as a re-formation of the site originally owned by them. It is not therefore competent for them now to raise a different case, namely, that the new formation is an alluvial accretion to their riparian land. Nor have they substantiated this new ground of claim.

I concur in the order made by my learned brother.

A. S. No. 58 of 1942 allowed in part.
A. S. No. 441 of 1942 allowed.

B.V.V.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Lala Jairam Das and others ... *Appellants**

v.

The King-Emperor ... *Respondent.*

Bail—Grant of—Powers of High Court—Appeal to Privy Council by special leave by convicted person—High Court has no power to grant bail—Criminal Procedure Code (V of 1898), Chapter XXXIX and section 426—Scope of.

---

1. (1868) 12 M.I.A. 136.

*P.C. Appeal No. 37 of 1944. 5th February, 1945.

Chapter XXXIX of the Code of Criminal Procedure together with section 426 is, and was intended to contain, a complete and exhaustive statement of the powers of a High Court in India to grant bail and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. The scheme of Chapter XXXIX is that sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426 and a consideration of that section reinforces the view that section 498 has no reference to convicted persons. Hence, it is clear that the Code confers no power on a High Court to grant bail in the case of a convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard. Neither is there any such power inherent in the High Court.

Their Lordships' judgment was delivered by

LORD RUSSELL OF KILLOWEN.—This appeal raises an important question, *viz.*, whether a High Court in India has power to grant bail to a person who has been convicted and sentenced to imprisonment, and to whom His Majesty in Council has given special leave to appeal against his conviction or sentence.

The questions which arise for consideration in such a case are of such a nature that they can only, their Lordships think, be properly dealt with by some authority in India possessing either knowledge of the relevant facts, or the means of acquiring that knowledge; but whether a High Court in India has power to grant bail in the circumstances indicated is a matter upon which divers views have been expressed in the Courts in India, and which comes before the Board for the first time, in the following circumstances:—

The Appellants were convicted under section 120-B read with section 420 of the Indian Penal Code, and sentenced to terms of rigorous imprisonment. On appeal, the High Court of Lahore upheld the convictions but altered the sentences. The Appellants, having obtained special leave from His Majesty in Council to appeal from the judgments of the High Court, applied to the High Court of Lahore to be released on bail. Their application was dismissed. From that dismissal they now appeal by special leave to His Majesty in Council. The application was dismissed upon the ground that the Judicial Committee had given no direction that an application for bail should be made to the High Court.

It will be convenient at the outset to review briefly the decisions in India.

In the year 1900 the High Court of Madras held (in a case in which special leave to appeal had been granted) that it had power to make an order for release on bail pending the decision of the appeal (see *Queen-Empress* v. *Subrahmania Ayyar*[1]). On the petition for special leave, an application for bail had also been made, when the Judicial Committee stated that any such application must be dealt with by the High Court. The case was argued before the High Court on the footing that the High Court could act under section 498 of the Code of Criminal Procedure (herein referred to as the Code). The judgment simply states,—

"In our opinion this Court has jurisdiction to make an order in this case releasing the accused on bail pending the decision of the Privy Council."

In the year 1908 in the case of *Diwan Chand* v. *King-Emperor*[2], the Chief Court which had previously dismissed an appeal from their convictions by the accused persons, dismissed an application by them to be released on bail pending the hearing of a petition by them to His Majesty in Council for special leave to appeal. The application seems to have been based on sec. 498 of the Code; but it was held that section 498

"does not refer to a case where the Court is *functus officio*, but refers to cases where the Court has still some power left as regards the sentence of the accused,"

and that the Court had no power to release the accused on bail.

In February, 1923, the case of *Tulsi Telini* v. *Emperor*[3], came before the High Court of Calcutta. A convicted person applied under section 498 of the

1. (1900) I.L.R. 24 Mad. 161.
2. (1908) Pun. Record Crl. Judgments No. 15, p. 50.
3. (1923) I.L.R. 50 Cal. 585.

Code for a stay of execution of the sentence pending the hearing of a proposed application to His Majesty in Council for special leave to appeal. It was decided that the High Court had no jurisdiction under sec. 498. The Chief Justice indicated that the High Court might have had jurisdiction by reason of clause 41 of the Court's Letters Patent if the case had come within that clause, which it did not. Richardson, J., distinguished the Madras case on the ground that in that case special leave to appeal had already been obtained. He was of opinion that the Court had no jurisdiction under section 498 to grant bail pending an application for special leave to appeal. The Court was *functus officio*, and had no *seisin* of the case. Nor had the Court any inherent jurisdiction. He pointed out however that it was open to the Local Government to suspend the sentence under section 401 of the Code.

On the 2nd April, 1923, the Code of Criminal Procedure (Amendment) Act, 1923, came into force by which there was added to the Code, section 561-A which runs thus:—

> "561-A. Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court, to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

In 1926, in the case of *Emperor* v. *Ram Sarup*[1], the High Court of Allahabad held that,

> "a High Court has certainly inherent jurisdiction to stay execution of its own order when the ends of justice require it."

It refused to grant bail at that stage because special leave to appeal had not yet been obtained; a petition had been lodged but had not been heard by the Judicial Committee. The applicant however was told to apply again, when leave to appeal had been granted.

In 1936, another case came before the High Court of Calcutta, *viz.*, *Babu Lal Chokhani* v. *Emperor*[2], in which it was held that after disposal of a criminal appeal the High Court is *functus officio* and has no *seisin* of the case; and cannot grant bail to a convicted person before leave to appeal has been granted by His Majesty in Council. The decisions in *Queen-Empress* v. *Subrahmania Ayyar*[3] and *Emperor* v. *Ram Sarup*[1], were distinguished on the ground that they were decisions given on the footing that leave to appeal had been or would be obtained. The application for bail had been refused by the High Court of Calcutta, who gave their reasons at a later date. Cunliffe, J., in his judgment mentions the fact that in the interval a suspension order had been made by the Local Government under section 401. Henderson, J., (differing from the view expressed in the Allahabad case) was of the opinion that section 561-A had no reference to bail, which was a matter specifically provided for by the Code itself. It appears (from the judgment of Blacker, J., in a later case) that, special leave to appeal having been subsequently obtained, a Single Bench Judge did in fact grant bail to Babu Lal Chokhani.

In the same year the matter came under the consideration of the High Court of Nagpur in the case of *Bashiruddin* v. *King-Emperor*[4]. The High Court, on an appeal from an acquittal, had convicted a person charged with an offence under section 420 of the Indian Penal Code. He applied for bail pending an application to His Majesty in Council for leave to appeal. It was held that after signing judgment convicting the accused the High Court was *functus officio*, and had thereafter no power to release him on bail unless special leave to appeal was granted. The application was therefore refused "for the present", because no directions had been received from their Lordships of the Privy Council. Bose, J., who delivered the judgment of the Court, repudiated the idea of the High Court possessing any inherent jurisdiction to grant bail. The question of

1. (1926) I.L.R. 49 All. 247.
2. I.L.R. (1937) 1 Cal. 464.
3. (1900) I.L.R. 24 Mad. 161.
4. I.L.R. (1937) Nag. 236.

bail had been expressly dealt with by the Code, "and although the matter of bail pending an appeal to the Judicial Committee is not there, its provisions on the subject must be regarded as exhaustive."

Finally in 1937, an application for bail was made to the High Court of Lahore by a convicted person who had obtained special leave to appeal from His Majesty in Council; but no direction had been given as to applying for bail to the High Court. It was decided that once the High Court had passed orders in a criminal appeal, it was *functus officio* and had no seisin of the case, but that the *seisin* might be revived when the Judicial Committee gave leave to appeal and directed the High Court. Blacker, J., in delivering judgment said that he had no power to grant bail because in granting leave to appeal the Judicial Committee had given no direction to apply to the High Court for bail. He dismissed the application but stated—

"it can in my opinion be revived if the Petitioner obtains and produces any direction from their Lordships of the Privy Council in the matter which would authorize this Court to go into the question of bail."

In the present case, the Appellants' application to be released on bail pending the decision of their appeal to His Majesty in Council was dismissed by the High Court of Lahore (following the last-mentioned case) on the ground that their Lordships had given no "direction to the High Court to entertain an application for bail".

From this review of the authorities in India it would appear that the various views which have prevailed may be summarised thus: (1) if leave to appeal has been obtained from His Majesty in Council and the Judicial Committee has said that an application for bail must be dealt with by the High Court, the High Court will have power under section 498 of the Code to release a convicted person on bail pending the hearing of the appeal; (2) the High Court has an inherent power to do so if special leave to appeal has been obtained from His Majesty in Council; (3) the High Court possesses no inherent power as regards bail; (4) after disposal of a criminal appeal by the High Court it is *functus officio,* has no longer any *seisin* of the case, and cannot grant bail to a convicted person unless special leave to appeal has been obtained from His Majesty in Council; (5) in addition there must also be a direction received from "their Lordships of the Privy Council"; (6) the High Court's *seisin* of a criminal case, and its power to grant bail under section 498 of the Code, is revived when the Judicial Committee gives leave to appeal and directs the High Court.

Their Lordships are unable to recognise any proceeding or conduct on their part in the past which can be properly described as a "direction to a High Court to entertain an application for bail". When any suggestion of bail has been mooted on behalf of a successful Petitioner for special leave to appeal against his conviction, their Lordships have always refused to consider the matter, and have no doubt at times said that the question of bail could only be properly and satisfactorily dealt with in India. But they have never given any formal direction to a High Court on the matter, nor has any reference to bail been made in Orders in Council granting leave to appeal.

Moreover their Lordships find it impossible to appreciate how suggestion or direction by them in regard to an application for bail to the High Court, made or given when they decide to advise His Majesty that special leave to appeal from a sentence or conviction should be granted, can in any way determine or affect the question under consideration on this appeal. The High Court either does possess power to grant bail in the given circumstances or it does not. If it possesses the power it possesses it independently of any suggestion or direction made or given by their Lordships. If it does not possess it, no suggestion or direction made or given by their Lordships could confer such a power. So far as any decision in India is based upon the fact that such a suggestion was made or direction given, or that no such suggestion was made or direction given, it cannot be supported on that ground alone.

There remains for consideration the question whether the alleged existence of a power in a High Court to grant bail in the stated circumstances can be established on other grounds. If it exists, it must be either because it was conferred on the High Courts by the Code, or because it is one of those inherent powers which are referred to in section 561-A of the Code.

So far as the provisions of the Code are concerned, their Lordships can discover nothing therein to justify the view that any such power is thereby conferred on a High Court. The question of bail is dealt with in Part IX of the Code ("Supplementary Provisions") under Chapter XXXIX which is entitled "Of Bail". The only granting of bail which is referred to in that chapter (which consists of sections 496 to 502 inclusive) is the granting of bail to accused persons. There is no reference therein to the granting of bail to persons who have been tried and convicted. It is true that in the Indian decisions, section 498 seems to have been treated as though it included cases in which persons already convicted were concerned; but any such view seems to their Lordships to be a misapprehension based upon a mistaken reading of a few words which occur in that section. The section runs thus:—

"498. The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive; and the High Court or Court of Session may, in any case, whether there can be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police-officer or Magistrate be reduced."

Two things must be observed in relation to this section. The only bonds "executed under this chapter" are executed by persons who are accused (not convicted) persons; and the words "whether there be an appeal on conviction or not" merely qualify or relate to the words "in any case," and only mean that all accused persons are within the section whether their case is appealable on conviction or not. In truth the scheme of Chapter XXXIX is that sections 496 and 497 provide for the granting of bail to accused persons before trial, and the other sections of the Chapter deal with matters ancillary or subsidiary to that provision. The only provision in the Code which refers to the grant of bail to a convicted person is to be found in section 426. Section 426 forms part of Chapter XXXI of the Code which is entitled "Of Appeals" and is included in Part VII of the Code ("Of Appeal, Reference and Revision"). The section is in these terms:—

"426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond;

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

A consideration of section 426 reinforces the view that section 498 has no reference to convicted persons; for if they were covered by section 498, it would confer upon the Court of Session a power to grant bail to a convicted person appealing to the High Court, a power which under section 426 is confined to the High Court. Their Lordships feel no doubt that the Code confers no power on a High Court to grant bail in the case of a convicted person, and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.

If such a power exists in a High Court it can only be as a power inherent in a High Court, because it is a power which is necessary to secure the ends of justice. It must be observed that, as decided by Hallett, J. after a careful and exhaustive review of the authorities, that no such inherent power exists in the High Court of Justice in this country (Ex parte *Blyth*[1]). In a case (reported

1. (1944) 1 K.B. 532.

only in the "Weekly Notes"), Branson, J., appears to have made an order granting bail to a prisoner (in this country) who had been sentenced to 6 months' imprisonment in Cyprus but had been given leave by His Majesty in Council to appeal. [*Sutton* v. *Reg*[1].] The order however seems to have been made with the consent of the Secretaries of State for Home affairs and for the Colonies, and cannot be relied upon as any authority for the view that a Judge of the High Court has any inherent power to grant bail in the circumstances indicated. When such power exists, it is statutory.

It is perhaps conceivable that such an inherent power might exist in the High Courts in India, but historically it would seem unlikely in view of the provision found in the early Charters, which confer powers on the Judges in India by reference to the powers of the Justices of the King's Bench in England in terms such as the following—"and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England, as far as circumstances will admit". Section 561-A of the Code confers no powers. It merely safeguards all existing inherent powers possessed by a High Court necessary (among other purposes) to secure the ends of justice.

But other difficulties exist in the way of establishing that any such inherent power exists in a High Court. A power to grant bail to convicted persons would, if exercised, interrupt the serving of the sentence; the period of bail might even cover the whole of its term. A power to grant bail would not include a power to exclude the period of bail from the term of the sentence; that this is so is shown by the fact that it was necessary to enact the special provision which is contained in sub-section (3) of section 426 of the Code. Under these conditions the exercise of a power to grant bail would, in the event of the appeal being unsuccessful, result in defeating the ends of justice. Moreover in the same event it would result in an alteration by the High Court of its judgment, which is prohibited by section 369 of the Code. Finally their Lordships take the view that Chapter XXXIX of the Code together with section 426 is, and was intended to contain, a complete and exhaustive statement of the powers of a High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail. They find themselves in agreement with the views expressed by Richardson, J., Henderson, J., and Bose, J., in the three cases referrd to earlier in this judgment.

It may well be that the case of an appeal from a High Court to His Majesty in Council was not within the contemplation of the framers of the Code. It may well be that a power to grant bail in such a case would be a proper and useful power to vest in a High Court. Their Lordships fully appreciate the propriety and utility of such a power, exercisable by Judges acquainted with the relevant facts of each case, and (if exercised) with power to order that the bail period be excluded from the term of any sentence. But in their Lordships' opinion this desirable object can only be achieved by legislation.

In the meantime there is a section of the Code to which, pending legislation, recourse may be had, and by means of which the ends of justice may be secured, *viz.*, section 401 which enables the Provincial Government to "suspend" the execution of a sentence. As hereinbefore appears recourse has been had to this section on previous occasions.

For the reasons indicated their Lordships will humbly advise His Majesty that this appeal fails and should be dismissed. In view of the general importance of the question which has been raised and decided their Lordships make no order as to the costs of this appeal.

V.S. *Appeal dismissed.*

1. (1932) Weekly Notes 272.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Fort William in Bengal)

PRESENT:—LORD THANKERTON, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Manindra Chandra Lala ... *Appellant**

v.

Mahaluxmi Bank, Limited .. *Respondent.*

Will—Probate—Delay in application for—Room for suspicion—Effect of proper proof of execution and attestation—Execution of will and, deed of authority to adopt on the same day—No improbability is involved—Execution and attestation, finding as to—Question of fact.

Though delay in the application for probate naturally gives rise to some suspicion, if the will is found to be proved by the evidence to have been properly executed and attested, the suspicion would no longer operate.

No improbability is involved in the execution on the same day of a will and a deed of authority to adopt, though it is unusual.

A finding as to execution and attestation is a pure finding of fact.

Their Lordships' judgment was delivered by

LORD THANKERTON.—This is an appeal in *forma pauperis* by special leave from a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 27th July, 1937, which set aside the judgment and decree of the District Judge of Chittagong, dated the 20th November, 1934, and dismissed the Appellant's application for probate of the Will of his paternal uncle, Girija Kirpa Lala, who died on the 1st January, 1904.

In his application for probate, filed on the 9th November 1933, the Appellant, as executor, propounds a Will dated the 30th December, 1903, two days before the death of the testator. The District Judge found for the execution and attestation of the Will, and the High Court reversed this decision on a pure question of fact.

The testator and his younger brother, Saroda, who is the father of the Appellant, constituted a joint Hindu family governed by the Dayabhaga school of Hindu Law. The testator left a widow Srimati Bama Sundari, but no issue. At that date, the appellant, who was then two or three years old, was the only son of Saroda, though some years later another son was born to Saroda, who did not survive infancy.

It is admitted that on the same 30th December, 1903, the testator executed a deed of authority conferring on his widow power to adopt "three sons successively, one by one, one after the death of another, from among the existing and future sons of my said full brother Saroda." It is admitted that the testator signed this deed, which was written by Srimantha Ram Lala, who had been in the service of the family for many years, and was then its chief clerk, and that it was duly attested by five persons: (1) Ramesh Chandra Sen, a Small Causes Court Judge who died in 1922; (2) Saroda himself; (3) Chandra Mohan Dastidar, the testator's brother-in-law, who died about 1925; (4) Digamber Bhattacharjee, who was a pleader and the testator's family lawyer, who had previously been tutor to Saroda; and (5) the testator's doctor, Dr. Beni Mohan Das. The deed was registered on the 5th February by the widow, who was identified by the witness Ishan Chandra Chowdhury.

With the exception of Saroda, the names of the scribe and the attesting witness appear on the Will in the same capacities. The material clauses of the will are as follows:

"(1) I am entitled to a moiety, *i.e.*, 8 annas share of the entire 16 annas of my ancestral and self-acquired immovable and movable properties and of the moneys of the moneylending business, etc., and I have been the owner, in possession in the said manner in Ejmal.

---

*P.C.A. No. 9 of 1943. 5th February, 1945.

My brother Sriman Saroda Kripa Lala has been the owner-in-possession of the remaining 8 annas share.

(2) I have no son or daughter living nor is there any likelihood of my getting any. If I die without any issue, my wife Srimati Bama Sundari shall be competent to take in adoption three sons one after another. But during the lifetime of one adopted son she shall not be competent to take another in adoption. If a son has to be taken in adoption, he shall have to be taken from my brother Sriman Saroda Kripa Lala. She shall not be competent to take a son in adoption from anybody else.

(3) When a son has been taken in adoption my adopted son shall be owner-in-possession of all properties in my share down to his sons, grandsons, and so on in succession. My wife Srimati Bama Sundari shall live in joint mess with the adopted son and shall enjoy the profits of my estate as a respectable lady. If there arises any misunderstanding with the adopted son then she shall be competent to live anywhere she desires separately and shall be competent, up to the end of her lifetime, to realise from my adopted son an annuity at the rate of Rs. 100 per month either amicably or by law suit making my estate liable for the same.

(4) If no son be taken in adoption then the son of my brother Sriman Saroda Kripa Lala shall get all the properties in my share. If a son is taken in adoption, then until the said adopted son attains majority or if no son is taken in adoption then until the son of the said Sriman Saroda Kripa Lala attains majority, my brother Sriman Saroda Kripa Lala shall be the executor of this Will and shall respectfully provide maintenance to my wife Srimati Bama Sundari adequately in a manner befitting a respectable lady. If he does not so provide, or if my wife does not live in joint mess with them then she shall be competent to realise the said annuity from the executor either amicably or by law suit making my estate liable for the same. When the person entitled to the property mentioned in this Will attains majority, he shall be the executor of this Will.

My wife Srimati Bama Sundari shall not be competent to encumber any portion of the properties left by me in any manner or to make a sale or transfer thereof in any way. She shall only get the maintenance or annuity as aforementioned. To this effect on the abovementioned terms I execute this Will in full possession of my senses and in sound mind and of my own accord. Finis."

After the death of the testator, his widow took possession of the estate and obtained mutation in her own name in the land registers. She died in 1920 without having exercised her power of adoption, and Saroda took possession of the estate, and obtained mutation in his name. There seems little doubt that the widow and Saroda successively dealt with the estate on the footing that there was no Will, and it was during Saroda's possession that the Respondent Bank obtained from him rights over the estate, which are now admitted as conferring on it a locus to oppose the Appellant's application for probate.

The learned trial Judge found that the Will was reasonable, natural and proper in its terms, and that there was no suspicion inherent in it that it did not express the mind of the testator. The learned Judges of the High Court thought otherwise, mainly on the ground of the exclusion of Saroda. Their Lordships agree with the trial Judge. Equally their Lordships are unable to find that any improbability is involved in the execution of both documents; on this point they agree with the reasoning of the trial Judge. With regard to the delay in the application for probate this naturally gives rise to some suspicion, especially when taken along with the adverse action of the widow and Saroda, but if the learned trial Judge's finding that the execution and attestation of the Will was proved by the evidence be accepted, he is certainly right in saying that the suspicion no longer operates. The finding of the learned Judge as to execution and attestation of the Will is a pure finding of fact, but the High Court have reversed it. It is therefore necessary to examine with care the reasons given for this reversal.

In certain circumstances, the present case is unusual. In the first place, the execution on the same day of the deed of authority, which is admittedly genuine, and therefore has genuine signatures of the testator, and of all the attesting witnesses to the Will, as also of the writer of both documents, is of importance, as well as their being both available for scrutiny by the Courts, including their Lordships. The only witness on this matter for the Respondents, Mohin Chandra Guha, gave evidence to the effect that he had seen the testator three or four days before his death and that he had told him nothing about either the deed of authority or the Will; but, in consequence of information given to him by his mother-

in-law, he questioned the testator about the authority to adopt, which he admitted, but the will was not mentioned. This evidence is valueless in face of the substantial body of evidence on which the trial Judge has relied. With the exception of the writer, Srimanta Lala, all the witnesses in the case gave their evidence before the trial Judge. Of the four attesting witnesses to the Will two were dead and two gave evidence at the trial. The son of Ramesh Chandra Sen, who died in 1922, stated that the signature on both documents looked like the signature of his father, and the son-in-law of Chandra Mohan Dastidar, who died about 1925 or 1926, stated definitely that the signatures on both documents were those of his father-in-law. The High Court take the evidence of the former of these two witnesses by itself, and hold that it did not prove that the Will bears the signature of his father; but the evidence surely proves identity of the signature with the genuine one. The High Court deal very summarily with the evidence of the son-in-law of Chandra Mohan Dastidar. In their Lordships' opinion the evidence of this witness is valuable. The first of the attesting witness, who are alive, was Digambar Bhattarcharji; the trial Judge thought he was evasive on certain points, affecting his private financial position, but accepted his evidence in so far as the factum of the Will is concerned. The High Court refused to accept any of his evidence, but in the opinion of their Lordships they have given no sufficient reason for interfering with the conclusion of the trial Judge, who was in a much better position to judge of the credibility of this witness. In this view, the execution of the Will by the testator and the signing of it by the attesting witnesses is amply proved. But in their Lordships' opinion, this conclusion is confirmed by their examination and comparison of the admittedly genuine deed of authority with the Will, as contemplated by section 73 of the Evidence Act. Their Lordships are strongly impressed with the apparent identity in nature and age of the paper on which the two documents are written, and also with the apparent similarity of the ink; further, the signatures are very similar, with the one exception of the dissimilarity of the *C* of Chandra Mohan Dastidar, which was put to his son-in-law, but their Lordships agree with the learned trial Judge that this difference is *prima facie* inimical to the suggestion of forgery. As regards identity in nature and age of the paper and similarity of the ink, it should be noted that the suggested forgery is supposed to have taken place nearly thirty years later.

Some further observations should be made; the trial Judge thought the other living attesting witness, Dr. Beni Mohan Das, who admitted his signature to the deed of authority, deliberately refused to acknowledge his signature to the Will, because of his financial relations with the Respondent Bank. The High Court do no more than refer to the finding of the learned Judge, but it may be observed that even if the learned Judge's opinion of this witness be disregarded, his evidence only amounts to *non memini,* as to an occurrence thirty years before. Their Lordships do not agree with the strictures of the High Court on the evidence of the aged and infirm witness, Srimanta Ram Lala. On the question of delay, their Lordships agree with the trial Judge that the necessity for probate did not arise till after the death of the widow, who had made no adoption. Contrary to the construction placed on it by the High Court, their Lordships are of opinion that by the terms of the Will the appointment of Saroda as executor did not emerge until there was adoption of a minor son, or, failing an adoption, until Saroda's son attained majority. Further, their Lordships desire to point out that knowledge of the dishonest dealing with the property by Saroda has not been brought home to the Appellant by evidence, and that Saroda's dealings with the property are consistent with suppression of the Will by him.

Their Lordships are therefore of opinion that the finding of the trial Judge as to the execution and attestation of the Will should be restored and that probate should be granted to the Appellant. This will not preclude the Respondent Bank from maintaining in any ordinary civil action by or against them, any rights in the property to which they may deem themselves entitled.

Their Lordships will, accordingly, humbly advise His Majesty that the appeal should be allowed, that the judgment and decree of the High Court should be set aside, and that the judgment and decree of the District Judge should be restored. The Respondent will pay the Appellant's costs on the pauper scale of this appeal and those in the High Court.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE SHAHAB-UD-DIN.

The Imperial Bank of India, Madras .. *Appellant**

v.

Balasubramania Pandia Tevar and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 73—Custody Court and executing Court being same—Receipt of assets—Point of time—Need for formal order—Undertaking by executing creditor to bring back money into Court—Liability for interest.

In a case of rateable distribution, where the custody Court and the executing Court are the same, two things must take place. First, the Court should as the custody Court come to the conclusion that there was no objection to transfer the amount necessary to pay the decree-holder at whose instance the fund was attached; and secondly, there must be an order by the custody Court transferring the amount to the credit of the first attaching creditor's suit which it is engaged in executing. It is only then that there can be said to be receipt of assets within the meaning of section 73, Civil Procedure Code. Where the latter of the two conditions is not satisfied the executing creditor is not entitled to draw out the money and other creditors are entitled to participate in the distribution so long as such an order is not passed.

Viswanathan Chetti v. *Arunachalam Chetti,* (1920) 39 M.L.J. 608: 44 Mad. 100 (F.B.) considered.

Where an executing creditor drawing out money from Court gave an undertaking to the Court that he would pay back the whole or any portion of the amount drawn by him if so ordered by that Court,

Held, that the undertaking involved an obligation to repay the sum with interest if later on it was found that the money had been wrongly claimed and wrongly paid.

Appeal against the Order of the District Court of Tinnevelly, dated 16th March, 1942, and the further order of the said Court, dated 1st April, 1942, in E.A. No. 145 of 1935 (in O.S. No. 3 of 1922), etc.

C.M.A. No. 221 of 1942.

O. T. G. Nambiar instructed by *Messrs. King* and *Partridge* for Appellant.

T. R. Venkatarama Sastriar, V. Ramaswami Aiyar, S. Panchapakesa Sastri, K. S. Sankara Aiyar, V. T. Rangaswami Aiyangar, K. S. Sankararaman, K. G. Srinivasa Aiyar, K. Raja Aiyar, T. M. Ramaswami Aiyar, K. Venkateswaran, N. Rajagopala Aiyangar, D. Munikanniah, N. G. Krishna Aiyangar, Messrs. K. S. Champakesa Aiyangar, Srinivasan and *Srinivasan, C. Srinivasachari* and *R. Desikan* for Respondents.

C.M.A. No. 355 of 1942.

T. R. Venkatarama Sastriar and *V. Ramaswami Aiyar* for Appellant.

N. Rajagopala Aiyangar, D. Munikanniah and *A. Sundaram Aiyar* for Respondents.

C.M.A. No. 391 of 1942.

N. Rajagopala Aiyangar for Appellant.

Respondent not represented.

C.M.A. Nos. 417 and 418 of 1942.

T. R. Venkatarama Sastriar and *V. Ramaswami Aiyar* for Appellant.

N. Rajagopala Aiyangar, D. Munikanniah, A. Sundaram Aiyar and *R. Desikan* for Respondents.

---

*A.A.O. No. 221 of 1942, etc. 26th July, 1944.

C.M.A. No. 419 of 1942.

T. R. Venkatarama Sastriar and *V. Ramaswami Aiyar* for Appellant.

D. Munikanniah, A. Sundaram Aiyar and *R. Desikan* for Respondents.

C.R.P. No. 1124 of 1942.

T. R. Venkatarama Sastriar and *V. Ramaswami Aiyar* for Petitioner.

N. G. Krishna Aiyangar, N. Rajagopala Aiyangar, D. Munikanniah, T. M. Ramasami Aiyar, A. Sundaram Aiyar, K. S. Champakesa Aiyangar and R. *Desikan* for Respondents.

C.R.P. Nos. 1274 to 1276 of 1942.

T. R. Venkatarama Sastriar and *V. Ramaswami Aiyar* for Petitioners.

N. Rajagopala Aiyangar, D. Munikanniah and *A. Sundaram Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS.—This and the connected appeals are filed against the order of the District Judge of Tinnevelly passed in several proceedings which were taken to enforce the rights of various decree-holders and the Imperial Bank of India, the appellant, and raise a common question whether certain decree-holders can obtain rateable distribution under section 73 of the Code of Civil Procedure of the amounts deposited in O.S. No. 3 of 1922 on the file of the lower Court which related to the succession to the Uthumalai estate. That estate was originally held by one Navaneethakrishna and on his death his adoptive mother Rani Meenakshi Sundara Nachiar succeeded to the estate. She died in 1921 and disputes arose as to the succession to the zamindari. There were three claimants. One claimed to be the father's sister's son of the last male holder and filed O.S. No. 1 of 1922 on the file of the lower Court. The second claimant was one Marudappa Tevar who claimed that he was adopted by the deceased Rani Meenakshi Sundara Nachiar and he filed O.S. No. 2 of 1922. Lastly, one Subbayya Tevar as the maternal uncle of the last male owner filed O. S. No. 3 of 1922 in the same Court. Marudappa Tevar who claimed by adoption also put forward an alternative claim under a will executed by Rani Meenakshi Sundara Nachiar. The District Judge upheld the claim of Subbayya Tevar as the maternal uncle of the last male owner. He negatived the adoption of Marudappa Tevar and also the claim under the will put forward by him. Thus O.S. No. 3 of 1922 was decreed and the other suits were dismissed. There were appeals to the High Court in all the suits. The claim of Subbayya Tevar as the maternal uncle was upheld. Marudappa's adoption was negatived but he was held entitled to the bequests under Rani Meenakshi Sundara Nachiar's will, the will being held to be valid and operative. Further appeals were taken to the Judicial Committee and the decision of the High Court was confirmed. (Vide *Bala Subramania* v. *Subbayya*[1].)

Subbayya Tevar, the claimant who succeeded in all the Courts, was in need of finance for the conduct of the litigation. One Subramania Chetti undertook to finance him and by April, 1929, had advanced very large sums of money. By that time the District Court's judgment had been delivered and appeals had been filed in the High Court. It was expected that the unsuccessful parties would apply for stay of execution of the decree of the lower Court which directed delivery to the successful party of possession of the estate and the moneys which had been collected by the receiver appointed during the pendency of the litigation in the trial Court. There was an agreement, Ex. I, between Subramania Chetti the financier and Subbayya Tevar by which the amount advanced by Subramania Chettiar till then was settled at nine lakhs of rupees. It was provided *inter alia* that this sum of nine lakhs should not carry interest from the 12th February, 1929, that Subramania Chetti should be entitled to the income from the entire pannai (private) lands in the zamindari as and from Fasli 1339 except to a small extent which was negligible, that the Chetti was entitled to draw the monies deposited in Court, if necessary, by giving security, and that the money when drawn should

1. (1938) 1 M.L.J. 426: L.R. 65 I.A. 93: I.L.R. (1938) Mad. 551 (P.C.).

be appropriated towards the discharge of the amount of nine lakhs. It was also provided that the Chettiar should have a charge over the Zamindari and its properties except certain temples and their properties of which the zamindar was the dharmakartha.

As expected, applications were filed for stay of execution of the decree in various suits and the applications were all heard together by the High Court which passed a common order on the 8th August, 1929. In regard to the moneys then in deposit in the District Court, it was ordered that Subramania Chettiar may, on furnishing security to the satisfaction of the District Court, draw the whole or any portion from time to time. As regards delivery of possession the order was that Subbayya Tevar may take possession of the zamindari on giving security. In pursuance of this order, Subramania Chettiar drew three lakhs of rupees after giving security. The appeals in the High Court were all disposed of by a common judgment, dated the 2nd April, 1935. Before that date several persons had obtained decrees against Subramania Chettiar and had levied attachments over the moneys in Court to the credit of O.S. Nos. 1, 2 and 3 of 1922, District Court, Tinnevelly and the attachments were made between the 15th September, 1932 and November, 1934. Before disposing of the appeals, on the 2nd April, 1935, the High Court directed Subramania Chettiar to be made a party respondent to some appeals in order to enable him to watch the litigation and prevent any collusive compromise to his detriment in the further stages of the litigation. On the same day the learned Judges passed an order in order to give effect to an agreement which had been entered into by that date between Subramania Chetti, Subbayya Tevar, and the Imperial Bank, which had advanced large sums of money to Subramania Chetti in order to enable him to finance the litigation. The order empowered the Imperial Bank to draw a sum of four and a half lakhs of rupees from and out of the moneys deposited to the credit of the original suits in the lower Court on their undertaking to pay back the said moneys in the event of the decrees passed by the High Court being reversed by the Privy Council. This was to be applied *pro tanto* in discharge of Subbayya Tevar's liability to the Chettiar. This order was also incorporated in the decrees passed by the High Court in the various appeals.

When passing this order and when incorporating the same in its decrees the High Court was unaware of the fact that there were numerous decree-holders including the Indian Bank, Ltd., who had obtained decrees against Subramania Chettiar and had levied attachments against his interest in the moneys in question. One of such creditors, the Indian Bank, having come to know of the order in favour of the Imperial Bank put in an application stating that the order empowering the Imperial Bank to draw 4½ lakhs was made without notice to the creditors and that it would prejudicially affect the many creditors who had attached the said moneys prior to the date of the order. The learned Judges passed an order on the 9th May, 1935, and said this:

> "In disposing of appeals Nos. 159 of 1929, 411, 428 and 429 of 1930, we passed certain orders on 2nd April, 1935, permitting certain funds lying in the Court below to be drawn out. On the consent of the parties, we permitted the funds to be drawn out by the Imperial Bank (who is not a party to the appeals) on behalf of the successful party. It is now brought to our notice that that there may be strangers who have attached the funds as a result of the attachment order. Our order is not intended to affect such persons. All such claims will have to be dealt with by the appropriate courts having jurisdiction to deal with the matter and it is to be understood that the power of such courts to deal with it is not affected by any order we have passed."

Before this order was passed by the High Court, the Imperial Bank had drawn a sum of three lakhs of rupees from the District Court on giving an undertaking to that Court that they would pay back any amount which might be drawn by them if at any time the Court should order a refund of any such amount. As there were still 1½ lakhs of rupees to be drawn, the Imperial Bank presented an application to the District Court, Tinnevelly, on the 25th July, 1935, requesting the issue of a cheque for the said sum of 1½ lakhs. By this time, nine creditors who

had attached the interest of Subramania Chetti, appeared and opposed this application on the ground that the Imperial Bank can draw the money only after satisfying their claims which were stated to be then of the value of Rs. 1,72,616. The application filed by the Imperial Bank was E.A. No. 145 of 1935. Notice of this application was given to the various attaching decree-holders and they were all made party respondents to that application. They also filed independent applications for payment of the sums due to them. Certain orders were originally passed by Mr. Mack, the then District Judge, on the 9th November, 1935. They came up on appeal in C.M.A. No. 454 of 1935 and connected C.M.As. and this Court reversed the decision of the District Judge on some questions and remanded the applications for disposal according to law. The applications were disposed of by Mr. Balakrishna Ayyar on the 16th March, 1942, by a common order and the present appeal and the connected appeals are filed against that order.

Not content with opposing the application of the Imperial Bank the various attaching decree-holders filed independent applications of their own. They were all persons who had obtained decrees against Subramania Chetti. Some of these decrees were passed by the High Court in the exercise of its jurisdiction on the Original Side, some by the Sub-Court, Tinnevelly and one by the Sub-Court, Kumbakonam. In some cases, the interests of Subramania Chetty had already been attached, some before judgment and some after decrees. Most of them were, by the time of Mr. Mack's order, transferred to the District Court, Tinnevelly and applications for execution had been filed. Further details will be mentioned as and when necessary. So, by the time the matter came on for disposal before Mr. Mack in 1935, there were 9 decree-holders who put forward claims as attaching decree-holders. The effect of Mr. Mack's order is one of the principal questions in this appeal.

Briefly put, Mr. Mack upheld the contention of the attaching decree-holders that they were entitled to priority over the Imperial Bank. The agreement between the Imperial Bank, Subramania Chetty and Subbayya Tevar amounts to a private transfer. Under section 64 of the Code of Civil Procedure, any private transfer after an attachment is subject to all claims enforceable under the attachment. The orders of the High Court were passed with the consent of the parties and therefore have no higher sanction than that of a mere private transfer. Even if one decree-holder had attached the interests of Subramania Chetty, under the explanation to section 64, claims enforceable under an attachment include claims for the rateable distribution of assets. So, if before the assets were realised by the Court in execution of the decree of one decree-holder, other dcree-holders had satisfied the provisions which would enable them to obtain the benefit of rateable distribution under section 73, Civil Procedure Code, the private transfer would be subject to all these claims.

Mr. Mack rejected the claims of two of the decree-holders on the ground that their attachments were not valid and subsisting on the date of the equitable assignment. The claims of the other seven decree-holders were upheld. The amounts due to them as on the date of his order was ascertained to be Rs. 1,59,361. By that time, three lakhs had been drawn by Subramania Chettiar and another, three lakhs by the Imperial Bank. Marudappa Tevar whose claims as the legatee were upheld by the High Court was found entitled to a large sum out of the amounts which had been deposited into Court during the pendency of the suits and of the appeals. The fund in Court represented the sums due to the legatee and the sums due to Subbayya Tevar. After setting apart the sums due to the legatee and deducting the sums which had already been drawn, there was only a sum of Rs. 1,35,553-2-6. Mr. Mack directed the Imperial Bank which had given an undertaking to bring back any amounts when so ordered by the Court, to repay a sum of Rs. 23,807-13-6. Then the Judge proceeded to consider the question whether the various decree-holders whose claims he upheld were entitled to payment of the amounts found due to them. Curiously, the Judge held for reasons which

will be mentioned later, that they were not entitled to payment in these proceedings. He accordingly dismissed their applications for payment, but he directed the Imperial Bank to bring back the sum of Rs. 23,807-13-6 within a month from the date of the order. This was a common order passed on the application of the Imperial Bank and on the applications of various decree-holders. Appeals and revision petitions were filed by the various parties in this Court and they were all disposed of by a common judgment by Venkataramana Rao and Newsam, JJ., on the 4th May, 1939. They dissented from the view taken by the District Judge and held that the various decree-holders were entitled to payment of the sums adjudged to be due to them under their various decrees in these very proceedings. They upheld the decision of the District Judge directing the Imperial Bank to bring back the sum of Rs. 23,807-13-6. But instead of passing final orders, the learned Judges remanded the matter to the District Court. By the time the matter came on before the District Judge for disposal in 1942, several other persons obtained decrees against Subramania Chetti and applied for execution to the District Court, Tinnevelly and they filed applications claiming rateable distribution under section 73, Civil Procedure Code. Their claim was that as the amount of Rs. 1,59,000 which had been adjudged by Mr. Mack to be due to the seven decree-holders whose claims he upheld had not been received by the executing Court and as the result of the High Court judgment further calculations had to be made and further questions decided, the amount continued to lie to the credit of O.S. No. 3 of 1922 on the file of the District Court and that, therefore, they were in time under section 73, Civil Procedure Code. The District Judge upheld that contention and hence this appeal.

There are some other minor questions which are raised but the important question depends upon the applicability of section 73, Civil Procedure Code, to the facts of this case. That section runs thus:

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons."

Under this section if in execution of a decree in one suit, assets are held by a Court and more persons than one applied to the Court for the execution of decrees for payment of money passed against the same judgment-debtor *before the receipt of such assets,* they are entitled to rateable distribution of these assets. There must be assets held by one executing Court and the applications for execution of other decrees must be made before the assets were received by the executing Court. If these two conditions are satisfied, the new decree-holders (meaning thereby the decree-holders who obtained their decrees after the order of this Court in 1939) would be entitled to the benefit of section 73.

The assets were not realised by sale in execution of any property in this case. Moneys had already been deposited into Court to the credit of O.S. Nos. 1, 2 and 3 of 1922 in the succession suits. Where assets are held by one Court which may be called the custody Court and another Court is executing a money decree, Order 21, rule 52, Civil Procedure Code, provides that the amount in the custody Court shall be attached by the executing Court by giving notice to the custody Court to hold the amount or property subject to further orders of the executing Court. The material portion of Order 21, rule 52 leaving out words which do not apply to this case runs as follows:

"Where the property to be attached is in the custody of any Court, the attachment shall be made by a notice to such Court, requesting that such property may be held subject to the further orders of the Court from which the notice is issued: . . .

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court."

If the executing Court and the custody Court are different, the amount lying in the custody Court can be got at by the decree-holder executing his decree in another Court by attaching the amount in the custody Court in the manner provided under Order 21, rule 52. After levying the attachment in the manner laid down in that section, further orders would be passed by the executing Court requesting the custody Court to send so much of the money as is necessary for payment to the decree-holder. The money would then be received by the executing Court and that would be the time when the assets are received for the purpose of section 73. If the two Courts had been different and the money had been received by the executing Court from the custody Court there would be no difficulty in finding the exact time before which the persons claiming rateable distribution must apply for execution of their decrees.

In a case where, as here, the executing Court and the custody Court are the same, there is considerable difficulty in determining this point of time. Different views have been expressed on this question, but so far as this Court is concerned, the question is settled by a decision of a Full Bench of five Judges in *Visvanathan Chetty* v. *Arunachalam Chetty*[1]. The position is expressed slightly differently by the different Judges who composed the Bench. Krishnan, J., held that when the Court, as the attaching Court, passes an order in execution of the decree under execution calling for the money standing to the credit of another suit the point of time under section 73, C. P. Code, is reached. Other Judges hold that realisation of assets under section 73, C. P. Code, takes place when the Court as the custody Court passes an order transferring the amount standing to the credit of one suit to the credit of the decree under execution.

The respondents urge that there has been no order either calling for the money from the suit to the credit of which the amount stood or an order transferring any amount to the credit of the decree under execution. The contention of the appellant, on the other hand, is that the order of Mr. Mack and the appellate order of this Court passed by Venkataramana Rao and Newsam, JJ., are sufficient to satisfy the requirements laid down by this Court in the decision just referred to.

A further contention is raised that the Full Bench decision is wrong and that in a case where the executing Court and the custody Court are the same, no such order was at all necessary and that the moment when the execution petition was filed in one suit, and attachment ordered, the amount standing to the credit of another suit in the same Court must be taken to have been available for distribution in the decree under execution and that the relevant point of time under section 73, C. P. Code, is the time when attachment order was passed. But it is not open to us, sitting as a Division Bench, to consider the correctness of that decision, and, therefore, we merely note this argument.

The only question, therefore, that we have to decide is whether either the order of Mr. Mack or the order of this Court contains directions which would satisfy the requirements of the Full Bench decision. Having regard to the large interests at stake lengthy arguments have been addressed to us by the learned advocates on either side and they have subjected the orders of the two Courts to a very minute examination and close scrutiny. Before going further we must at this stage refer to the Full Bench decision at some length.

One Lakshmanan Chetti was the common debtor. He had two creditors, Viswanathan Chetti and Arunachalam Chetti. In execution of a decree which Lakshmanan Chetti had obtained in O.S. No. 207 of 1908, in the Sub-Court, Ramnad, a sum of Rs. 1,755 was deposited to his credit in that Court. Viswanathan Chetti, one of his creditors, obtained a decree in O.S. No. 87 of 1913, against Lakshmanan Chetti for Rs. 8,415-10-3, filed an execution petition on the 23rd December, 1915, and applied for attachment of the sum of Rs. 1,755 lying in deposit in the same Court to the credit of Lakshmanan Chetti in O.S. No. 207 of 1908. On this

1. (1920) 39 M.L.J. 608: I. L. R. 44 Mad. 100 (F.B.).

application, the Subordinate Judge passed an order "Attach. Notice of attachment to the second defendant." The other creditor Arunachalam Chetti obtained a decree in O.S. No. 9 of 1914, against Lakshmanan Chetti and filed an execution application in the Sub-Court, Ramnad, on 25th February, 1916, and applied for attachment of the same amount. On the 6th March, 1916, the Subordinate Judge ordered the amount to be rateably distributed among the two decree-holders. Then Viswanathan Chetti filed the suit which came up before the Full Bench for a declaration that he was entitled to the whole of the amount in priority to Arunachalam Chetti. Both the lower Courts dismissed the suit and owing to some conflict of opinion a reference was made to the Full Bench. The question considered by the Full Bench was whether Arunachalam who applied for execution on the 25th of February, 1916, was entitled to rateable distribution. It will be noticed that in execution of the decree of Viswanathan an order of attachment was actually passed in December, 1915, prior to Arunachalam filing his execution petition. If the order of 23rd December, 1915, directing attachment of the amount in question was the point of time relevant under section 73, C. P. Code, the respondent Arunachalam would not be entitled to rateable distribution. No further order had been passed by the Court in execution of Viswanathan's decree before Arunachalam filed his execution application.

Wallis, C.J., who delivered the leading judgment held that when the executing Court and the custody Court are different, it is only when the funds in the custody Court are actually sent over and received by the executing Court that it can be postulated that there was 'receipt of assets' within the meaning of section 73, C. P. Code. Then the learned Judge proceeded to consider a case where the attaching Court and the custody Court are the same. He first pointed out that the fact that money was lying in Court to the credit of the judgment-debtor in a suit other than that in which the attachment was made does not make it assets "held by a Court" within the meaning of section 73. Then comes the following observation:

"Such assets may of course be attached by the Court in execution of another decree of the same Court. The Code does not say how such attachment is to be made. The order "attach" appears to be sufficient, though of course some record of the attachment must be placed among the records of the suits to the credit of which the money is lying. On the other hand, the order of attachment does not of itself effect a transfer to the credit of the suit in which the attachment is made so as to constitute a receipt of assets within the meaning of section 73. The money may not be available as being already subject to another attachment, possibly in another Court, and it is only then the Court comes to the conclusion that there is no objection and orders the money, or so much as it thinks necessary to satisfy the decree-holders who have applied to it for execution, to be transferred to the credit of the first attaching creditor's suit which it is engaged in executing, that there can be said to be receipt of assets within the meaning of section 73 and that a rateable distribution can be made."

Sadasiva Iyer, J., held that the expression "before the receipt of such assets" must be qualified by the understood words "levied in the course of execution and paid into Court in satisfaction of any of the decrees under execution or transferred for purposes of execution, to the credit of one or more of the decrees under execution."

Then he said:

"In the present case, the assets seem not to have been "received" in this sense till long after the dates of the two attachments, in question and in fact, till the money was impliedly so transferred to the credit of one or both of the decrees just before the order was passed for rateable distribution."

Krishnan, J., expresses himself slightly differently and said this after dealing with eases of property which had to be sold in order to be converted into money:

"But if it is money in the hands of the custody Court the attaching Court may direct the money to be paid over to itself. It is only when the attaching Court gets the money into its hands so as to be available for distribution, that section 73, Civil Procedure Code, comes into play; rateable distribution will then have to be given to all decree-holders who have brought themselves under the terms of the section by having applied for execution prior to the receipt of such assets. When the attaching Court and the custody Court are

the same, it seems to me that an order should be made by the Court as attaching Court for transferring the money from the suit in which it came into Court to the suit in which the attachment took place. It is only when this is done, the Court as attaching Court, can properly be said to have received the assets and to hold it within the meaning of section 73; and the decree-holders who have attached prior to that are entitled to rateable distribution". Having regard to the expression "prior to the *receipt* of such assets" in section 73 the rule is perhaps more accurately laid down by the other four Judges who composed the Full Bench. Having regard to the considerations pointed out by Wallis, C.J., that even an order of attachment passed by the Court in execution of one decree may not be sufficient as funds may not be available for being attached for the reason that they were already attached by another Court or for some other reason, it would perhaps be more accurate to say that when the custody Court considered that money was available and made an order transferring the amount or so much of it as was required for the purpose of the execution to the credit of the suit in which the decree was being executed that the receipt of assets can be said to have taken place.

This case was subjected to discussion by this Court in a later decision reported in *Nachiappa Chettiar* v. *Subbier*[1].

One Subbier filed a suit O. S. No. 506 of 1917 in the Periakulam District Munsif's Court and obtained attachment before judgment of certain goods belonging to the debtor in March, 1917. The goods were sold and the proceeds paid into Court on the 11th April to the credit of that suit. Nachiappa Chetti, another creditor of the same debtor, filed O. S. No. 678 of 1917 and attached before judgment the money in deposit in the same Court on the 14th April, and obtained his decree on the 19th April. On the 7th June he applied not in his own suit but in Subbier's suit, *i.e.*, the suit in which the money had been realised, for payment out to him of his decree amount. Before the application was disposed of Subbier got his decree on the 2nd July and applied on 3rd July for a cheque for payment out of the money which had been deposited in his suit. There were two other creditors of the same debtor. One Rangasami Iyer filed O. S. No. 617 of 1917, obtained a decree on the 8th June and applied for payment on the 29th June. The last creditor Sunara Row obtained his decree and applied for payment on the 30th July. The last one was after Subbier got his decree and applied for a cheque which he did on the 3rd July. The District Munsif held that Subbier was entitled to the whole of the amount. The matter was taken to the High Court and Bakewell, J., held that Nachiappa who obtained the decree first, attached the amount and applied for payment out on the 7th June was exclusively entitled to the proceeds. There was a further appeal to two learned Judges and they differred. Sadasiva Ayyar, J., held that Subbier, Nachiappa and Rangasami were entitled to rateable distribution while Coutts-Trotter, J., agreed with Bakewell, J. Against this judgment a further appeal under the Letters Patent was filed and it came on before three learned Judges. It was clear that attachment before judgment gave the creditor no right to a preference. Hence Subbier was not by reason of the fact that he got the amount attached before judgment entitled to any preference on that ground. Under the Code, assets realised by selling the property attached before judgment, are not assets realised in execution of a decree. All the judges held that the assets would become "assets realised in execution of a decree" when a decree is later on obtained by the creditor or at any rate when after obtaining the decree he applies for execution of it. Nachiappa's claim had been upheld by two learned Judges for the reason that after obtaining the decree in the same Court he applied to the custody Court for payment out. All the learned Judges held that as no order was passed on the application of Nachiappa directing payment to him of the amount in deposit, the stage of receipt of assets had not been reached; and they further held that his application to the custody Court did not give him any right. They said that he ought to have applied in his own suit, *i.e.*, to the executing Court and obtained some order on his execution

1. (1923) 44 M.L.J. 413: I.L.R. 46 Mad. 506.

petition. It was only later that assets could be held to have been received in his suit.

Then dealing with the claim of Subbier to be paid the amount exclusively it was held that attachment before judgment did not give him any exclusive right, that by the time he obtained his decree Nachiappa had already obtained his decree and had applied for execution and that Rangasami also obtained his decree and applied for payment on the 29th June, 1917. 3rd July, 1917, when after getting his decree Subbier applied for payment out was treated as the relevant point of time.

One learned Judge went further and said that the point of time for the purpose of section 73 would be only when some order was passed on Subbier's application or on the application of other creditors directing payment out and that therefore it was only when the District Munsif passed his order on the 31st August, 1917, ordering the amount to be paid exclusively to Subbier that the receipt of assets could be said to have taken place. All the learned Judges pointed out that the case before them was covered by the Full Bench decision in *Visvanadhan Chetti v. Arunachalam Chetti*[1]. Schwabe, C.J., summarised the decision in the earlier Full Bench thus:—

"It was held . . . that there is no receipt of assets within the meaning of section 73 until the Court holding the money comes to the conclusion that no objection exists, and orders the money to be transferred to the credit of the first attaching creditor's suit, the decree in which it is engaged in executing. This is the effect of the judgment of Wallis, C.J., with which Ayling and Napier, JJ., agreed. . . . Krishnan, J., put it that only when the money is transferred to the credit of the suit in which attachment takes place, can the attaching Court be said to have received the assets and hold them within the meaning of section 73, and that the decree-holders who have attached prior to that are entitled to rateable distribution. . . . In this case the money in Court had never been levied in execution nor transferred to the credit of any other suit than Subbier's and did not become available as assets held by the Court under section 73 until an order was made on the application by Subbier for execution of his decree."

Krishnan, J., who was a party to the earlier Full Bench decision put the point thus:—

"We have thus here also a case of money in Court being attached by the same Court as in the Full Bench case. According to the ruling in the Full Bench case that money became assets held by the Court and available for payment out in execution only after the District Munsif passed the order for payment."

Dealing with Nachiappa's claim on the ground that he had applied for payment out in execution of his decree which he obtained the learned Judge said this:

"But in applying for execution by issue of a cheque to him he applied to the Court in Subbier's suit, O.S. No. 566 of 1917. So far as he was concerned, the Court acting in that suit was the custody Court, the attaching Court being the Court acting in his own suit No. 678 of 1917. The custody Court could not pay out the money to him without an order of the attaching Court to that effect as it has to hold the money subject to the orders of the attaching Court under rule 52 of Order 21, Civil Procedure Code. If he wanted payment out he should have applied in his own suit and obtained an order from the Court as attaching Court for payment in execution before asking the custody Court to pay or he should have applied in his own suit for transferring the amount to the *credit of his suit and then got that Court to pay the money to him.* This application to the custody Court for payment was not a proper application and was rightly disregarded by the District Munsif."

The italics are ours.

Dealing with the claim of Nachiappa, Wallace, J., said this:

"In any case the appellant's application was thus not in form, and the Court, either for this reason or some other, did not choose to act on it then. Had it then ordered payment one might infer that it had, as custody Court, settled the question of priority, and had itself, as attaching Court, transferred the money at credit of Subbier's suit to the credit of appellant's suit. But it refrained, and the money remained where it was, held as before, money in the Court as custody Court held subject to the disposal of the Court as attaching Court, in suspense, as it were until the attaching Court had before it a proper execution application, *i.e.,* an execution application in the suit in which the first attachment took place, or an execution application in another suit praying for transfer to that suit of the money from the suit in which it was. When that occurred it was then for the attaching Court and exe-

1. (1920) 39 M.L.J. 608: I.L.R. 44 Mad. 100 (F.B.).

cuting Court to decide to work out the attachment and call up the attached money for satisfying the various applicants. There was no such application until Subbier put in his application on 2nd July, 1917, for cheque. In my opinion the Court ought to have then proceeded to execute Subbier's decree with due regard to the claims of persons entitled under section 73 to rateable distribution. There was no reason then for delaying matters further. However the Court still refrained from moving, and, so far as one can see, the fund remained in the custody Court in the same state as it had been from the beginning until on 31st August, 1917, the Court decided to distribute and determined that the whole of it should go to Subbier. Only then can it be said that the attaching Court called up the fund in the custody Court for use in execution of the pending unsatisfied decrees and only then can it be said that the assets were received within the meaning of section 73."

There are three periods of time indicated by different Judges in these two decisions. One is what we may call the extreme view that it is only when the executing Court orders payment out of the sum to one or other of the decree-holders that receipt of assets takes place. Another view is that when the executing Court or attaching Court passes an order calling for money from the custody Court this point of time is reached and the third view is that the custody Court should pass some order transferring the amount to the credit of the executing Court. We think that the right view is that propounded by Wallis, C.J., in which three other Judges concurred and that is the third of the views just set out. Even if there is no formal order by the custody Court transferring the amount to the credit of one of the suits under execution we may, if payment out is ordered by the executing Court, take it that money was impliedly transferred by the custody Court to the credit of the decree in which payment out is ordered.

Stress has been rightly laid before us by the learned advocate for the appellant that owing to the delay in the disposal by the Court of the application of the Imperial Bank and of the applications of the seven attaching decree-holders whose claims were upheld by the High Court, various new decree-holders have been held entitled to participate imposing a further liability on the Imperial Bank and also further disabilities on the attaching decree-holders. They therefore urge that when Mr. Mack adjudged that Rs. 1,59,000 was payable to the seven attaching decree-holders whose claims he upheld and directed Rs. 23,807 to be brought in by the Imperial Bank it must be held that there was receipt of assets within the meaning of section 73. In the alternative they urge that at any rate, when the Court proceeded to consider the claims of the executing creditors for payment out to them, this point of time must be held to have been reached. It is pointed out that it is only after the receipt of assets actual or notional, that the executing Court can proceed to discuss the rights of the various attaching decree-holders for payment out. As the District Judge discussed their right to payment out, it must be held that the assets had been received by the executing Court. This appears to be a very plausible argument but it does not take note of at least one vital factor. The first portion of the order of Mr. Mack is that Rs. 1,59,000 odd was payable to the seven decree-holders. Having said that, he directed the Imperial Bank to pay Rs. 23,000 odd into Court. There it stopped. It is only Rs. 1,35,000 odd that was in Court, at that time. Rs. 23,000 odd had yet to be paid by the Imperial Bank and by no stretch of language or application of fiction, can it be said that Rs. 23,807 had been actually or notionally received by the executing Court. It had not been received even by the custody Court. It had been paid out on an undertaking to repay. The order was that the Imperial Bank should repay and it is admitted that until this day the amount has not been repaid. Thus the argument of the learned Advocate for the appellant fails as regards this sum of Rs. 23,000 odd at any rate. So this argument cannot be accepted.

Then it is argued that because Mr. Mack discussed the question whether the attaching decree-holders were entitled to payment out or not, it must be held that there was receipt of assets. But we cannot accept the proposition that the executing Court must always be taken to discuss the question of payment out only after receipt of assets. Take a case where several decree-holders apply to

the Court for execution of their decrees and a large sum is lying to the credit of that common judgment-debtor in *another Court.* Money is called for but not received yet. In such a case the Court might, in case of disputes between rival decree-holders on the question whether some of them are entitled to rateable distribution, determine that question beforehand so that as and when the money is received from the custody Court, payment may be made in accordance with the decision already arrived at. So it cannot be postulated that merely because the execution Court determined the question whether some people were entitled to rateable distribution or whether all or any of the decree-holders were entitled to payment out, we must assume a prior receipt of assets. In this case, the Court considered that the money had not become the property of Subramania Chetti, their common creditor. Rightly or wrongly, Mr. Mack took the view that there was no assignment to Subramania Chetti of the amount that had been deposited to the credit of O.S. Nos. 1, 2 and 3 of 1922. It was, therefore, held that as the money had not become that of the judgment-debtor, no decree-holder was entitled to payment out. It was evidently to meet a possible eventuality of an appellate Court differing from his view that Mr. Mack directed the Imperial Bank to bring back Rs. 23,800 and ordered retention in Court of Rs. 1,59,000.

His order to retain this sum in Court is again said to bring about the receipt of assets within the meaning of section 73 as laid down in the two decisions just referred to. Here again, it is one single order regarding the entire sum of Rs. 1,59,000. Rs. 1,35,000 admittedly was the only sum lying in Court. The order "retain" could not possibly cover Rs. 23,000 odd which had not yet been received and could only mean that as and when that amount was paid, it should be retained in the custody Court. That being so, it is difficult to see how the order to retain the money and that in the custody Court can be held to be receipt of assets by the executing Court. It is to the custody Court that the Imperial Bank had given the undertaking to pay the sum which that Court might order to be brought back. It is as the custody Court that the District Court determined how much of the amount lying in its custody had to be transferred for the purpose of meeting the claims of attaching decree-holders. But there the custody Court stopped. As laid down by the Full Bench in *Viswanathan Chetti* v. *Arunachalam Chetti*[1] and accepted by the later decision two things must take place: first, the custody Court must come to the conclusion that there was no objection to transfer the amount necessary to pay the decree-holder at whose instance the fund was attached; secondly, there must be an order by the custody Court *transferring the amount to the credit of the first attaching creditor's suit which it is engaged in executing. It is only then that there can be said to be receipt of assets within the meaning of section* 73. Here the first requisite is satisfied, namely, the custody Court came to the conclusion that there was no objection, and determined that Rs. 1,59,000 and odd was necessary for the purpose of satisfying the claims of the decree-holders. But there was no order transferring the amount to the credit of any of the attaching creditor's suits which it was engaged in executing. In fact, the entire sum was not yet with the custody Court. It had yet to get in a large sum of over Rs. 23,000 from the Imperial Bank. Until the Imperial Bank paid back that sum, the custody Court cannot be said even by any fiction, to have transferred Rs. 1,59,000 to the credit of one of the decrees under execution.

We have then to deal with the argument based upon the judgment of the High Court. Here there is less room for the argument that the order of the High Court satisfies the requirements laid down by the two decisions. The District Judge held that the attaching decree-holders were not entitled to payment. One reason given by him was that the common judgment-debtor Subramania Chettiar had not become the owner of the fund in question. The

1. (1920) 39 M.L.J. 608: I.L.R. 44 Mad. 100 (F.B.).

High Court disagreed with this, but they did not order payment to the seven decree-holders whose claims were upheld. They expressly held that they were not dealing with any other objection to payment out. They stated thus:

"In view of the expression of opinion by us that there has been an equitable assignment of a portion of the fund in Court in favour of Subramania Chetti, the order of the learned Judge in the Court below in so far as it negatives the right of the attaching creditors to payments to them in satisfaction of their claims on the ground that there was no money directly available to Subramania Chetti is wrong. *Whether the view of the learned Judge is correct or not on any other ground, we do not propose to go into the matter.*"

The italics are ours.

Then they remanded the matter to the lower Court. Thus it is clear that the High Court did not decide that the attaching decree-holders were entitled to payment. They dealt with the one reason given by the District Judge and held that it was wrong, but they did not decide whether the order of the District Judge can be upheld on any other ground. So, they remitted the question for consideration on other grounds. Even as regards the determination of the sum due to the attaching decree-holders, while there is a statement that it was Rs. 1,59,000 as mentioned by the District Judge, they ordered fresh calculations to be made obviously for the reason that by the time the matter came on for consideration by the High Court, the sums due to the attaching decree-holders would be very much more than the sum of Rs. 1,59,000. They were all entitled to interest up to the date of payment. Hence, we cannot agree with the contention of the learned Advocate for the appellant that the order of the High Court satisfies the requirements of section 73, Civil Procedure Code.

The next point raised by Mr. O. T. G. Nambiar, the learned Advocate for the Imperial Bank, is that his clients are not bound to repay the sum which they had drawn with interest. This argument has no force whatever. An undertaking to repay involves an obligation to repay the sum with interest if later on it is found that the money had been wrongly claimed and wrongly paid. In the present case, at the time when the High Court was asked to pass an order empowering the Imperial Bank to draw Rs. 4½ lakhs, it was not brought to the notice of the High Court that there were decree-holders who had already obtained decrees against Subramania Chetti and attached the sums lying to the credit of O.S. Nos. 1, 2 and 3 of 1922. The Imperial Bank was evidently ignorant of these attachments, but Subramania Chetti must have known them. At any rate, without imputing any dishonesty to any one, it is clear that there was a representation to the Court that the Imperial Bank was entitled to the amount and it is equally clear that the order was one which the Court would not have passed if it had been apprised of the real facts of the case. That a private alienation cannot prevail against the claims enforceable under the prior attachments is clear and we have pointed out the Imperial Bank was only a private transferee. Without providing for all the decree-holders who had attached or whose claims were enforceable under an attachment already made, the Imperial Bank could not draw the amount in Court, and yet as soon as the order was made by the High Court, the Imperial Bank got an order from the District Court on the 25th April, 1935, allowing three lakhs of rupees to be drawn from Court. Fortunately, the District Court took an undertaking from the Imperial Bank on that occasion that they would pay back the whole or any portion of the amount drawn by them if so ordered by that Court. Now, it has been found that the Imperial Bank had no right whatever to draw the whole of the three lakhs of rupees. Whatever sum is found repayable has to be repaid with interest. It is not necessary to refer to the decisions in detail. It is enough to refer to *Alagappa Chettiar* v. *Muthukumara Chettiar*[1].

Several other questions were raised by Mr. Nambiar which are of a technical character, and which were not raised in the lower Court. It is said by him that

1. (1917) I.L.R. 41 Mad. 316 at 318.

his client was not a party to the proceedings taken by the attaching decree-holders and that, therefore, his client could not raise these objections in the lower Court. But on the application made by the Imperial Bank, all the attaching decree-holders were given notice and they were all made parties and they put forward their rights in opposition to the appellant's claim. The applications for payment out made by the various decree-holders were all heard together along with the application of the Imperial Bank for payment to them of a further sum of one and a half lakhs. Right from the beginning all the applications were disposed of together both by the trial Court and by the High Court. We see, therefore, no force in the point raised by Mr. Nambiar. If there were any technical objections they ought to have been raised in the trial Court.

It is said that the decrees had not been transferred to the District Court, that the applications should have been filed in the custody Court, and that they must be headed in the suit in which the money was being realised. The last ground has no force whatever. We have not been referred to any provision of law or to any authority saying that the applications must be headed in the suit in which the moneys are being realised. The argument that the applications should be filed in the custody Court has no force whatever. This has been held to confer no right whatever in the decision in *Nachiappa Chettiar* v. *Subbier.*[1] The application for execution must be made to the executing Court. Dealing with the other objection that the decrees had not been transferred to the District Court, Tinnevelly, we see no foundation in fact. Further, this question involves investigation of facts and we are not prepared to allow it at this stage. All the decrees seem to have been transferred to the District Court for execution. It is, therefore, unnecessary to deal with the contention of Mr. Bashyam, the learned advocate for the contesting respondents that the other decree-holders who claim rateable distribution need not even apply to the Court which is realising the assets, that it is enough if applications for executions are made before the receipt of the assets to the various Courts in which they had got their decrees and that the only requisite is that before the assets are received by the one Court, applications for execution of other decrees should have been made but not necessarily to the Court which was realising the assets. Reliance is placed on a decision of this Court in *Nana Rao* v. *Arunachalam Chettiar*[2] and as we said already, it is unnecessary to go into this question.

The result is that C.M.A. No. 221 of 1942 fails and it is dismissed with costs of respondents who applied for execution after 1939. Before leaving this appeal, we have to make one further order as a result of an application for stay being made to this Court by the appellant and an interim order of stay having been obtained from this Court in C. M. P. No. 2082 of 1942. After filing this appeal, the appellant got an interim order staying the execution of the decree pending final orders on that petition. Unfortunately, having regard to the fact that there are a large number of respondents in that petition, the matter remains pending final hearing even on this day. It appears that several attempts were made by some of the respondents to have the petition heard, but they were not successful as the Court evidently thought that until all the respondents were served, the application for stay ought not to be heard.

The result is that the respondents decree-holders have been unable to enforce the order in their favour and to get the sums adjudged to them until this date. The order of the lower Court directs the Imperial Bank to bring back Rs. 1,79,609-14-3 by the 6th June, 1942. There is an obvious omission to provide for further interest in case of default of compliance with that order. This seems to have been a pure oversight. Under Order 41, rule 33, Civil Procedure Code, this Court has got powers to pass any order which the lower Court might have omitted to pass and that in favour of all or any of the respondents even though the respondents did not

1. (1923) 44 M.L.J. 413: I. L. R. 46 Mad. 506.
2. (1940) 1 M.L.J. 482: I.L.R. (1940) Mad. 526 (F.B.).

file an appeal or a memorandum of objections. We consider that this is a fit case in which we should exercise this power. Having regard to the fact that it was obviously an accidental omission by the lower Court and to the fact that the appellant got an interim order for stay on a petition which has not been heard even till this date, we direct that the appellant should bring back the sum of Rs. 1,79,609-14-3 with interest at six per cent. per annum from 6th June, 1942, until date of payment. Costs which have been ordered by this Court in C.M.A. No. 454 of 1935 to abide the result will have to be paid to the seven decree-holders who had attached prior to that date, *viz.*, 2nd April, 1935. They are respondents Nos. 4, 5, 6 and 9 to 12.

C.M.P. No. 2082 of 1942 is dismissed.

C.M.P. Nos. 1659 and 1660 of 1944 ordered.

C.M.As. Nos. 355 of 1942, 417 of 1942, 418 of 1942, 419 of 1942 and C.R. Ps. Nos. 1124 of 1942, 1274 of 1942, 1275 of 1942, and 1276 of 1942, are all dismissed with costs in C.R.P. No. 1124 of 1942 and in C.M.As. Nos. 417 of 1942, 418 of 1942 and 419 of 1942 one set in each. C.M.P. No. 3217 of 1942, dismissed.

B.V.V. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUPPUSWAMI AYYAR.

Sree Rajah Mantripragada Venkataraghava Rao Bahadur Zamindar Garu and others .. *Appellants**

v.

Sree Rajah Mantripragada Venkata Hanumantha Rao Bahadur Zamindar Garu (deceased) and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 54—Decree for partition falling under—Transmission to Collector for effecting partition—Power of Court to hear objections to the partition so made or to modify it—Position of Collector when acting under section 54—Remedy of person aggrieved by Collector's order.

The Court which passes a decree for partition to which section 54, Civil Procedure Code, applies and has sent it to the Collector for the purpose of effecting the partition has no power to hear objections to the partition made by the Collector or his subordinate or to modify the partition.

Chinnaseetayya v. *Krishnavenamma*, (1896) I.L.R. 19 Mad. 435, overruled.

When a Collector acts under section 54, Civil Procedure Code, he is performing a statutory duty and in doing so he is not under the control of the Court. Once the Court has sent the decree to the Collector for action under section 54, the matter passes entirely out of its hands. But this does not mean that a person aggrieved by the partition effected by the Collector is without a remedy. He has the right of asking the Board of Revenue to revise the Collector's order.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada, dated 8th January, 1940 and passed in O. S. No. 15 of 1929.

Ch. Raghava Rao and *S. Srinivasachari* for Appellants.

P. Satyanarayana Rao, *M. Venkateswarlu*, and *S. Venugopal Rao* for Respondents.

The Court (*Wadsworth* and *Patanjali Sastri, JJ.*) made the following

ORDER OF REFERENCE† : *Wadsworth, J.*—The appellants in this case were certain of the defendants in final decree proceedings arising out of a suit for partition. The properties consist of an estate paying revenue to Government. There had been a previous compromise whereby the sharers got possession of the major portion of the estate in separate shares. The present suit was filed by the plaintiff contending that the previous compromise was only tentative and asking for division of the estate including that portion which had been left undivided under the compromise. The preliminary judgment gave a decree for partition directing the division of the estate as far as possible on the basis of possession under the compromise, shares being adjusted in dividing up the portion which was held in common. The matter was at first referred to a commissioner, but he failed to execute the commission owing to the difficulties of the task. The decree was then by consent remitted to the Collector under section 54 of the Code of Civil Procedure so that the Collector might carry out the partition. The Collector deputed the Sub-Collector to divide the estate and the Sub-Collector passed proceedings

---

* Appeal No. 292 of 1940. 19th March, 1945.

† 22nd February, 1945.

to which elaborate schedules were attached dividing the estate largely on the basis of possession under the compromise, though he found it necessary to disturb this possession in certain respects. There were numerous objections by certain of the sharers, particularly those who had to be dispossessed of lands which they had been enjoying as a result of the compromise.

The Sub-Collector's proceedings were transmitted to the Court which proceeded to deal with the matter as proceedings preparatory to the issue of a final decree. Affidavits have been filed before us from counsel who represented the appellants in the Court below, the effect of which is that the prolonged arguments heard by the learned Subordinate Judge related only to the question whether he had jurisdiction to entertain objections to the partition made by the Sub-Collector. According to the affidavits there was no argument on the merits of the objections and no posting of the case for evidence. It appears from the B diary that the learned Subordinate Judge again adjourned the matter "for further arguments" after he had closed the case and reserved judgment and that on the date to which the case was adjourned it was finally closed and orders were passed two days later. According to the affidavits these adjournments for further arguments were merely a device to avoid reserving judgment for a period which would automatically bring the delay to the notice of the High Court. However that may be, the fact remains that when, after these numerous arguments and adjournments, the learned Judge came to pronounce judgment he did not deal at all with the question of jurisdiction, but dismissed the petitions, in a very brief order to the effect that no evidence had been adduced in support of the objections and he did not discuss the merits of the objections in the light of the materials available in the record of the Sub-Collector's enquiry.

It is contended for the appellants that the procedure of the learned Subordinate Judge has deprived them of the opportunity to which they were entitled of establishing their objections and getting the partition of the Sub-Collector rectified. On the other hand, the respondents contend that the learned Subordinate Judge had no jurisdiction to hear objections to the Sub-Collector's decision and that the procedure of passing a final decree has no relevance to a partition which has been referred to the Collector under section 54 of the Code of Civil Procedure. The appellants rely strongly on the decision in *Chinna Seetayya* v. *Krishnavenamma*[1]. We have not been referred to any decision of this Court which has thrown a doubt on the correctness of that case. There are numerous decisions of the Bombay High Court on the subject from which it is difficult to derive any fixed principle. The learned Judges in deciding the above case did not quote two Bombay decisions in *Dev Gopal Savant* v. *Vasudev Vithal Savant*[2] and *Shrinivas Hanmant* v. *Gurunath Shrinivas*[3] which were directly in point and which indicate a view different from that which was adopted by the Madras Bench. The only decision which is quoted is *Mahadaji Karandikar* v. *Hari D. Chikne*[4] which was not a case of partition at all, but a case of a decree transferred to the Collector for execution under the provisions corresponding to those which are now embodied in section 68 read with schedule III to the Code of Civil Procedure. Since the decision in *Chinna Seetayya* v. *Krishnavenamma*[1] there have been further Bombay decisions in *Purushottam Bhaskar* v. *Balkrishna Bandurang*[5], *Ramchandra Dinkar* v. *Krishnaji Sakharam*[6], *Bhimangauda* v. *Hanmant Rangappa*[7], *Thimmanna* v. *Govind*[8] and *Jacinto* v. *Fernandez*[9]. It is difficult to reconcile these decisions but the general tendency of the Bombay High Court seems to be to recognise a very limited power of interference by the Court with the decision of the Collector in partition matters, though there is one case at any rate, *viz.*, *Bhimangauda* v. *Hanmant Rungappa*[7] which holds that the Court has no power to interfere with the decision of the Collector.

The decision in *Chinna Seetayya* v. *Krishnavenamma*[1] proceeds on the assumption that when a decree is sent to the Collector for effecting a partition under section 54, the Collector is nothing more than an officer of the Court and can be controlled by the Court just as any other officer of the Court can be. There are difficulties in accepting this view of the relative position of the Court and the Collector. Under Order 20, rule 18, the 1st clause provides that the Court shall direct the partition to be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf. The 2nd clause which relates to property of the kind not covered by section 54 provides for a procedure whereby a preliminary decree is passed and further proceedings are taken which will result in final decree. This is elaborated in the order relating to appointment of commissioners. Order 26, rule 13 of the Code expressly excludes any case provided for by section 54 of the Code. Rule 14 goes on to provide for an enquiry by the Commissioner and report to the Court, the hearing of objections and the passing of the final decree. It seems difficult to resist the conclusion that whereas the Code treats the Commissioner as an officer of the Court who will make a report on which objections may be heard and a final decree may be passed, the Collector acting under section 54 of the Code is treated as an authority having the final power to effect a partition from whom no report is contemplated, no objections are to be heard and no final decree is to be passed. If once it is conceded that the reference under section 54 does not contemplate the passing of a final decree, there is an obvious difficulty in inferring that the Collector is a mere officer of the Court over whom the Court retains a general power of superintendence. It is, however, contended that apart from the explicit provision for a final decree in ordinary partition cases there is no substantial difference between the provisions of the Code as they stood in 1896 when the decision in *Chinna Seetayya* v. *Krishnavenamma*[1] was passed and as they stand now, in so far as the relative positions of the Collector and the Court are concerned, and our attention has been drawn to the fact that the judgment of the District Judge quoted in *Chinna*

1. (1896) I.L.R. 19 Mad. 435.
2. (1887) I.L.R. 12 Bom. 371.
3. (1890) I.L.R. 15 Bom. 527.
4. (1883) I.L.R. 7 Bom. 332.
5. (1903) I.L.R. 28 Bom. 238.
6. (1915) I.L.R. 40 Bom. 118.
7. (1918) I.L.R. 42 Bom. 689.
8. A.I.R. 1926 Bom. 258.
9. A.I.R. 1939 Bom. 454.

Seetayya v. *Krishnavenamma*[1] expressly refers to the contention that section 396 of the Code of Civil Procedure as it then stood, corresponding to Order 26, rules 13 and 14 also gave the power to hear objections and direct a fresh division which power was not found in section 265 which corresponds to the present section 54. We feel that there is some force in this contention, and, though it may well be argued that to treat the Collector as if he were a mere commissioner is out of harmony with the general scheme of the Code as it now stands, we feel some diffidence in holding that the decision in *Chinna Seetayya* v. *Krishnavenamma*[1] can be said to have become obsolete merely by reason of the changes in the Code which have been enacted since that time. The correctness of this decision therefore seems to us to require further consideration and we refer to a Full Bench the question whether when a decree for partition of an undivided estate assessed to the payment of revenue to the Government, directs that a partition shall be made by the Collector or any gazetted subordinate of his, the Court which passes the decree has power to hear objections to the partition as made by the Collector or his subordinate and modify that decision.

This appeal coming on for hearing on Monday, the 19th March, 1945, in pursuance of the aforesaid Order of Reference, the Court expressed the following

OPINION: *The Chief Justice.*—The question which the Full Bench is called upon to answer is whether the Court which has passed a decree for partition to which section 54 of the Code of Civil Procedure applies and has sent it to the Collector for the purpose of effecting the partition has power to hear objections to the order of partition actually passed. The section reads as follows:

"Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Crown, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares of such estates."

In *Chinna Seetayya* v. *Krishnavenamma*[1], a Division Bench of this Court held that the Court had power to hear and decide, objections to the division of the estate made by the Collector under section 265 of the Code of 1882, to which section 54 of the present Code corresponds, and in arriving at this decision the learned Judges relied on the decision of the Bombay High Court in *Mahadaji Karandikar* v. *Hari D. Chikne*[2], which was concerned with section 320 of the Code of 1882, to which section 68 of the present Code corresponds. There are several decisions of the Bombay High Court relating directly either to section 265 of the old Code or section 54 of the new Code. We shall refer to them in detail presently, but in passing we may say that in some of the cases the Bombay High Court has expressed the view that the Court has no power to interfere and in others that it has a limited power. Admittedly there is no provision in the Code of Civil Procedure giving the right to a party aggrieved by the partition effected by the Collector under section 54 to appeal to the Civil Court which passed the decree or to apply for revision of the Collector's order. When we read section 54 in the light of Order 20, rule 18 and Order 26, rules 13 and 14, it is in our judgment quite clear that the legislature did not intend the Court to have power to interfere with a partition made by the Collector under section 54.

Order 20, rule 18 was inserted in the Code for the first time in 1908, and it states what the decree shall contain when it relates to an estate assessed to the payment of revenue to the Government and what the Court may do when the decree relates to other immovable property. Sub-rule (1) reproduces the provisions of section 54. Sub-rule (2) says that in so far as the decree relates to other immoveable property the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required. It should be borne in mind that where the decree relates to an estate assessed to the payment of revenue to the Government there is no preliminary decree and the Court is not required to give directions. In the case of other immoveable property, the Court may, however, pass a preliminary decree and in it give directions with regard to the partition.

Order 26, rule 13 says that where a preliminary decree for partition has been passed, the Court may, in a case not provided for by section 54, issue a commission

1. (1896) I.L.R. 19 Mad. 435. 2. (1883) I.L.R. 7 Bom. 332.

to such person as it thinks fit to make the partition or separation according to the rights as declared in the decree. Sub-rule (1) of rule 14 states that the Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot the shares to the parties, and may, if authorised by the order, award sums to be paid for the purpose of equalising the value of the shares. Sub-rule (2) directs the Commissioner to prepare and submit a report to the Court which, after hearing the objections to the report which the parties may offer, shall confirm, vary or set it aside. Where the Court confirms or varies the report it shall pass a decree in accordance with its decision, but where it sets the report aside it shall issue a new commission or make such other order as it shall think fit. The Court retains complete control over the partition proceedings when it is a case of dividing immoveable property which is not an estate assessed to land-revenue, but where the partition is of an estate assessed to such revenue, the Court has no control over the Collector. The decree is transmitted to him to act in accordance with the rights of the parties declared therein and in accordance with the law for the time being in force relating to the partition or the separate possession of shares of such estate.

We will now refer to the decisions of the Bombay High Court which have been quoted to us in the course of the argument. The first of these is *Dev Gopal Savant* v. *Vasudev Vithal Savant*[1] which was decided by a Division Bench in 1887. It was there said that the Collector acted ministerially in executing the decree, but that so long as he acted within the bounds prescribed the Civil Court had no right to replace his discretion by its own. Although the Court had control of its own decree it had no right to interfere where there had been an objectionable partition by the Collector. In *Shrinivas Hanmant* v. *Gurunath Shrinivas*[2], another Bench said that the power given to the Collector under section 265 of the Code of 1882 was not in any way subject to the superintendence of the Civil Court or to revision by a Civil Court. The Collector could not refuse to carry out the decree or order of the Court, but when he had made a partition under the section the Court had no power to examine his work or to direct him to make a fresh partition. The same view was expressed in *Bhimangauda* v. *Hanmant Rangappa*[3].

There are two decisions of the Bombay High Court which run to some extent counter to these decisions. In *Purushottam Bhaskar* v. *Balakrishna Pandurang*[4], the opinion was expressed that the Court would have power to set aside wholly or partially a partition made by the Collector and to ask him to make a fresh partition where the action taken by him was *ultra vires*, in other words, did not conform to the directions contained in the decree. In *Ramachandra Dinkar* v. *Krishnaji Sakharam*[5], the Collector was regarded as an agent of the Civil Court and therefore the Civil Court had power to remedy a mistake made by its agent in carrying out its directions. The learned Judges regarded the case as resembling that of legatee over-paid by an executor under an order of the Court and observed that the legatee could be compelled to make a refund to allow of equal distribution of the estate.

We consider that the decision of this Court in *Chinna Seetayya* v. *Krishnavenamma*[6] is contrary to law. We do not share the opinion expressed by the Bombay High Court in *Purushotham Bhaskar* v. *Balakrishna Pandurang*[4] that the Court has power to direct the Collector to make a fresh partition and we do not regard him as an agent of the Court when acting under section 54. He has a statutory duty to perform and in performing it he is not under the control of the Court. He is not even required to report to the Court what he has done. When he has made the partition no order of the Court is necessary. Once the Court has sent the decree to the Collector for action under section 54, the matter passes entirely out of its hands.

This does not, however, mean that a person aggrieved by the partition effected by the Collector is without a remedy. The Collector is subject to the control of

1. (1887) I.L.R. 12 Bom. 371.
2. (1890) I.L.R. 15 Bom. 527.
3. (1918) I.L.R. 42 Bom. 689.
4. (1903) I.L.R. 28 Bom. 238.
5. (1915) I.L.R. 40 Bom. 118.
6. (1896) I.L.R. 19 Mad. 435.

the Board of Revenue. Section 5 of the Madras Board of Revenue Regulation, 1803, (Madras Regulation I of 1803) declares that the Board of Revenue has authority to superintend and control all persons employed in the executive administration of the public revenue. Section 5 of the Madras Collectors Regulation, 1803, (Madras Regulation II of 1803) says that Collectors shall be under the immediate control of the Board of Revenue and shall obey all orders communicated to them by the authority of that Board. Therefore, a person aggrieved by an order of the Collector under section 54 of the Code of Civil Procedure has the right of asking the Board to revise the Collector's order. In the recent case of *Ryots of Gorabandho* v. *Zamindar of Parlakimidi*[1], the Privy Council recognise a right of appeal to His Majesty in Council from an order of the Board of Revenue when leave is given.

The answer which we give to the question referred is that the Court which passes a decree has no power to hear objections to the partition made by the Collector or his subordinate or to modify the partition.

Costs of this reference will be made costs in the appeal.

V.S. ——— *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Chinni Venkatachalam Chetti .. *Petitioner**

v.

Kencham Bindu Madhava Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 115—*Madras Debt Conciliation Act (XI of* 1936), *sections* 10 *and* 19 (iv)—*Suit on promissory note—Earlier proceedings before Debt Conciliation Board—Statement submitted by creditor beyond the time allowed, but accepted by the Board—Effect.*

Though according to the strict language of section 10 (*i*) of the Debt Conciliation Act the statement by the creditor should be submitted to the Board within two months of the date of service of the notice to submit a statement, the Board can fix a time for such submission beyond two months. Where the Board fixed a date and did not meet on such date and the creditor filed his statement at the next meeting of the Board and the Board accepted it, without giving any reasons,

Held, that the Board had jurisdiction to extend the time and it is unreasonable to hold that on facts of this kind the Board must be held not to have granted any extension of time.

Though it is a question of fact to decide what action the Board took at any particular time, if in the discussion of this matter by the lower Court, the finding of fact is so influenced by the Judge's views of the law and the powers and the jurisdiction of the Board, it cannot be called a pure finding of fact and the High Court can interfere in revision.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the District Court of Nellore dated the 21st day of December, 1942, and passed in Appeal Suit No. 43 of 1941 [O. S. No. 395 of 1939, District Munsiff's Court (Additional), Nellore].

M. S. Ramachandra Rao for Petitioner.

K. Umamaheswaram, A. Bhujanga Rao and *D. R. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition by the unsuccessful plaintiff in O.S. No. 395 of 1939 on the file of the Court of the District Munsiff, Nellore. The decree dismissing his suit was confirmed on appeal by the District Judge of Nellore and the plaintiff has accordingly approached this Court with the present petition. The suit was upon a promissory note which was admitted, during the trial before the District Munsiff, to have been true and supported by consideration. In both the Courts, however, the suit has been dismissed on the ground that the provisions of section 19 (*iv*) of the Madras Debt Conciliation Act prevents its being filed. That section says that a suit for the recovery of any debt which has been deemed to have been duly discharged under sub-section (*ii*) of section 10 cannot be entertained by any Civil Court. Sub-section (*ii*) of section 10 provides that where a statement is not submitted to the Board in compliance with the provisions of sub-section (*i*), the debts

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 at p. 500 (P.C.).

* C. R. P. No. 758 of 1943. 23rd February, 1945.

which ought to be included in that statement shall be deemed for all purposes and on all occasions to have been duly discharged. Sub-section (*i*) of section 10 provides that a notice should be issued by the Board calling upon every creditor of a debtor to submit a statement of the debts owed to him by the debtor. Such statement must be drawn up in a certain manner and must be submitted within two months from the date of service or publication of the notice as the case may be.

A notice in this case was served on the 12th December, 1938. According, therefore, to the strict language of section 10 (*i*) of the Act, the statement ought to have been submitted to the Board on or before the 12th February, 1939. However, the notice itself is in these terms, that the creditors are requested to submit to the Board a statement in writing on or before the 16th February, 1939, at the Board's office. The notice concludes by calling the attention of the creditors to section 10 (*ii*) of the Act and to the penalty which will be exacted in case they do not comply with the Act. On the 16th February, the Board was due to meet at Kaluvoy; but there was no meeting of the Board owing to a sudden change of arrangements. A clerk was left at Kaluvoy with instructions to receive any statement that may be handed in. The present petitioner did not file any statement on that day. On the 27th February, the Board met. It appears from the orders passed in May that on that day, statements were received from the present petitioner and from other creditors. But no statements were received from creditors 4, 6 and 7. Therefore on that day, the debts due to these creditors were declared to be formally discharged for non-compliance with the provisions of section 10 (*i*). No definite statement is made as to what should happen to the creditors who filed statements on the 27th February. The matter of the application remained open with the Board until the 5th May, when it was finally closed.

It is argued first against the petitioner in this petition that because he did not file his statement on or before the 12th February, his debt was automatically discharged. It seems to me impossible to accept this argument. The discharge of the debt is a penalty for non-compliance with the terms of a notice and the terms of this particular notice gave the petitioner time until the 16th February. It is impossible therefore to accept the argument that because he did nothing on the 12th February, he has lost all his right of suit.

The real point of the case, it seems to me, is this whether on or after the 16th February, the Board was satisfied that the petitioner was for good and sufficient cause unable to comply with the direction to file his statement by the 16th February. There is no considered order of the Board on this matter. The matter does not appear to have been discussed at any length at any time before the Board nor was any specific application ever put in by the petitioner or any other creditor. We have simply the information that on the 27th February, the Board discriminated between the case of some creditors and that of others and that on the 16th February, in the B diary of the case, it is recorded that the application was adjourned to the 27th February at Nellore owing to the sudden change of camp. It seems to me that the only possible inference from these facts is that the Board, without of course giving this matter any elaborate attention, had realised that because they did not in fact meet at Kaluvoy on the 16th February, it was reasonable to give a further opportunity to the creditors to file their statements on the 27th. Those who did not were considered finally by the Board to have failed to comply with the notice, and the case of those who did were adjourned for further consideration. It seems to me quite unreasonable to hold that on facts of this kind, the Board must be held not to have granted any extension of time.

It was argued for the respondent here that the Board has no jurisdiction after the 16th February to grant any extension of time, an argument which seems to me quite unmaintainable in view of the language of the proviso which says provided that, if the Board is satisfied that any creditor *was*, for good and sufficient cause, unable to comply with such directions, it may extend the period for the submission of his statement of the debt owed to him. The use of the word ' was ' shows that

the Board had jurisdiction, after the period of expiry, to decide whether it could be extended or not.

Finally it is argued for the respondent that this Court ought not to interfere with what is essentially a finding of fact, as to what particular action was taken by the Board. It is of course a question of fact to decide what action the Board took at any particular time but in the discussion of this matter by the learned District Judge, the finding of fact is so influenced by the learned Judge's views of the law and the powers and jurisdiction of the Board that it cannot be called a pure finding of fact at all. I consider therefore that it is within the powers of this Court under section 115, Civil Procedure Code, to interfere in this matter.

In the result, the decree of the Court below will be set aside and in so far as all the other issues raised in the case have already been decided in favour of the plaintiff, he will be granted a decree as prayed for with costs throughout.

V.P.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Manager, Indian Express .. *Petitioner.**

Motor Vehicles Act (IV of 1939), sections 2 (8) and 42 (1)—Car used occasionally to carry bundles of newspapers to railway station—Permit for 'goods vehicle' not obtained—Offence.

The petitioner used on two occasions his motor car for taking bundles of newspapers from the Newspaper Office to the Railway Station. He had no permit for the use of the car as a transport vehicle. He was convicted of an offence under the Motor Vehicles Act and sentenced to pay a fine.

Held, that as the petitioner had no permit to use the motor car as a transport vehicle and the motor car was a "goods vehicle" within the meaning of section 2 (8) of the Motor Vehicles Act by reason of the fact that it was used twice to carry newspapers, the offence charged was committed.

The contention that the motor car was not a "goods vehicle" within the meaning of the second part of the definition in section 2 (8) inasmuch as the car was not used 'solely' for the carriage of goods or solely for the carriage of goods in addition to passengers was untenable because 'solely' in the context is used only in contra-distinction to the words following, *viz.*, 'in addition to passengers.'

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Chief Presidency Magistrate, Egmore, dated 21st September, 1944 and made in M. V. No. 379 of 1944.

B. T. Sundararajan and *Vepa P. Sarathi* for Petitioner.

C. D. Venkataramanan for the Crown Prosecutor for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by the learned Chief Presidency Magistrate of an offence under the Motor Vehicles Act and has been sentenced to pay a fine of Rs. 50. The facts as proved are that a motor car owned by the petitioner was twice used, on the 1st of July and a week before, for taking bundles of newspapers from the office of the Indian Express to the railway station. Section 42 (1) of the Motor Vehicles Act prohibits the use of a transport vehicle save in accordance with the conditions of a permit and section 123 provides the punishment for an offence in contravention of section 42 (1). A goods vehicle is by definition a transport vehicle [section 2 (34) of the Motor Vehicles Act]; and "goods vehicle" is defined in section 2 (8) as follows:

"'goods vehicle' means any motor vehicle constructed or adapted for use for the carriage of goods or any motor vehicle not so constructed or adapted when used for the carriage of goods solely or in addition to passengers."

The petitioner held no permit for the use of the motor car as a transport vehicle, and accordingly if the motor car was a "goods vehicle" as defined in section 2 (8) by reason of the fact that it was used twice to carry newspapers to the station, the offence charged was committed. The first part of the definition of "goods vehicle" given in section 2 (8) of the Act does not apply to the present case. The argument advanced is that the petitioner's motor car is not a goods vehicle within the meaning of the second part because it was used only twice for the carriage of goods, and so

* Cr. R. C. No. 54 of 1945. 22nd March, 1945.
(Cr. R. P. No. 53 of 1945).

has not been used solely for the carriage of goods or solely for the carriage of goods in addition to passengers. This is a quite untenable construction. The view taken by the Chief Presidency Magistrate that the word "solely" is in contra-distinction to the words which follow, *viz.*, "in addition to passengers", is undoubtedly correct; and he puts the meaning of "solely" in the context clearly when he says "in other words it makes no difference to the answer to the question whether a particular vehicle is a goods vehicle, whether in addition to goods passengers are carried or not." The second part of the definition of "goods vehicle" as it stood before amendment was "or a motor vehicle not so constructed or adapted which is habitually used for the carriage of goods and not of passengers." This was an obviously unworkable definition, and it cannot be believed that the Legislature substituted for it a definition which would enable a motor vehicle to be used for the carriage of goods without a permit provided that it was used for the carriage of passengers only for one or two days in the year. The petitioner, in my opinion, was rightly convicted. The petition is therefore dismissed.

K.C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

P. S. B. Bommanna Chettiar and another .. *Appellants**

v.

The Province of Madras, represented by the Collector of Salem and another .. *Respondents.*

Madras Town-Planning Act (VII of 1920), section 34, Proviso—Date of acquisition—Date of taking possession in pursuance of an award and not the date of the award.

For the purposes of the Madras Town-Planning Act an acquisition can be said to be made only when possession is actually taken in pursuance of an award and not when the award is passed. An award is nothing more than a binding offer. It cannot amount to an acquisition.

The proviso to section 34 of the Madras Town-Planning Act is clear and unambiguous and it definitely lays down that acquisition should be made within three years of the notification. Acquisition is of title to the property; in other words, it is the vesting of title. It is not complete until possession is taken.

Appeals against the decrees of the District Court, Salem, in A.S. Nos. 78 and 102 of 1943 respectively preferred against the decrees of the Court of the Subordinate Judge, Salem, in O.S. Nos. 18 of 1942 and 59 of 1942, respectively.

K. Narasimha Aiyangar and *D. Ramaswami Aiyangar* for Appellant in S. A. No. 874 of 1944, *D. Ramaswami Aiyangar* and *P. S. Srinivasa Desikan* for Appellant in S. A. No. 930 of 1944.

The Government Pleader (*K. Kuttikrishna Menon*) and *K. S. Desikan* for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in these two appeals is the same and that is whether for the purposes of the Madras Town-Planning Act, an acquisition can be said to have been when an award was passed or only when possession was actually taken in pursuance of the award. A notification of the intended acquisition was published in the Fort St. George Gazette on the 6th September, 1932. An award was made by the Collector on the 26th August, 1935, and possession was taken on the 18th December, 1936. Under section 34 of the Madras Town Planning Act, if the land is not acquired within three years from the date of the notification, it (the notification) shall cease to have effect as a declaration under section 6 of the Land Acquisition Act of 1894. It is common ground that if the land was acquired only on the date when possession was taken, more than three years had elapsed from the date of the notification and the notification will cease to have effect as a declaration under section 6 of the Land Acquisition Act of 1894 and the acquisition will be bad. In that case the plaintiffs' suits for recovery of possession must be

* S. As. Nos. 874 and 930 of 1944. 6th March, 1945.

decreed. The trial Court held agreeing with the plaintiffs' contention that an acquisition under the Act can be said to have occurred only when possession was taken under section 16 of the Act. The suits were therefore decreed except as to damages claimed by the plaintiff. On appeal the District Judge held that the acquisition became complete when the award was passed and that having been made within three years of the 6th of September 1932, the acquisition was valid. The appeals were allowed and the suits were dismissed.

In this Court it is urged by Mr. Ramaswami Aiyangar, the learned advocate for the appellant, that the notification was really on the 10th August, 1932, as that is the date which the notification bears. It is not the date of the order of the Government proposing to acquire the land in question that is material, but it is the date when it is actually notified. If, for instance, the order of the Government dated 10th August, 1932, was never published, it could not be said that there was a notification under section 6. Hence I agree with the Courts below that the relevant date is the 6th September, 1932, when the order of the Government was actually published in the Fort St. George Gazette.

The more important question is whether a land can be said to have been acquired until possession is actually taken. The question has been well discussed on all its aspects by the Subordinate Judge. He has referred to the various provisions of the Madras Town-Planning Act and of the Land Acquisition Act. The acquisition under the Madras Town-Planning Act is to be made substantially under the provisions of the Land Acquisition Act and therefore a reference to the provisions of the Land Acquisition Act is necessary. Chapter VII of the Madras Town-Planning Act provides for land acquisition. Section 33 says that immovable property required for the purpose of a Town-Planning Scheme shall be deemed to be land needed for a public purpose within the meaning of the Land Acquisition Act, 1894, and that it may be acquired either under the said Act or under the said Act as modified in the manner provided in that chapter. Even in cases in which the land is acquired under the Land Acquisition Act as modified by Chapter VII of the Town-Planning Act, a notification has to be published under section 14, clause (5) of the Town-Planning Act. A notification under section 14, clause (5) takes the place of a notification under section 6 of the Land Acquisition Act, and no further declaration is necessary. Section 34 then says that—

> "It shall not be incumbent on the Provincial Government, or officer authorised in that behalf, to take immediate steps for the acquisition of such land."

Then comes the proviso in the following words :

> "Provided that if the land is not acquired within three years from the date of the notification it shall cease to have effect as a declaration under section 6 of the Land Acquisition Act, 1894."

We are not concerned with the notification of the provisions of the Land Acquisition Act made by the Town-Planning Act and we may therefore leave out those provisions of the Town-Planning Act from consideration. The provisions of the Land Acquisition Act have now to be considered and the question is whether a land can be said to have been acquired under the Land Acquisition Act directly when an award is passed under section 12 of that Act. Section 11 of the Land Acquisition Act provides for an enquiry and for determining the area, the compensation and the apportionment of the compensation. Section 12 provides that the award is to be filed in the Collector's office. Section 16 provides that possession may be taken at any time after the award. Section 17 provides for a case of urgency. Even before an award is made, possession can be taken. Section 48 says that the Government is at liberty to withdraw from the acquisition of any land of which possession has not been taken.

The wording of section 16 is in my opinion very significant. It runs thus :

> "When the Collector has made an award under section 11, he may take possession of the land, which shall thereupon vest absolutely in the Crown free from all encumbrances."

Title vests absolutely in the Government on possession being taken. Similarly section 17 provides that even before an award is passed, possession may be taken

and upon the Government taking possession title vests absolutely in the Government. Both these sections indicate when title vests in the Government. If title vests in the Government only then, the acquisition cannot be said to have been made earlier. Acquisition is of title to the property; in other words it is the vesting of title. Both sections 16 and 17 lay down that upon taking possession title vests in the Government. Section 48 puts the matter beyond all doubt. It says that the Government may withdraw from an acquisition at any time before possession is taken. That means that acquisition is not complete until possession is taken.

The exact nature and effect of an award under section 12 of the Land Acquisition Act was considered by the Judicial Committee in *Ezra* v. *Secretary of State for India*[1]. There the Judicial Committee pointed out that the award is a mere offer of a particular sum for the property proposed to be acquired. The offer is binding on the Government, but it is not binding on the other party. The other party may, if he does not accept the amount offered, require the question to be referred to the Civil Court and that Court is to decide the amount payable. This decision shows that an award is nothing more than a binding offer. It cannot amount to "acquisition."

It is argued that this view may cause great hardship. It is said that the local authority for whose benefit an acquisition is made under the Town-Planning Act should not be asked to take up a property until the price it has to pay is finally determined, that this may take more than three years from the date of the notification and that the construction compelling the authority to take up the land within three years of the notification may involve serious loss. But we are not concerned with such difficulties. The Madras Town-Planning Act has definitely laid down that the acquisition should be made within three years of the notification. Courts are not concerned with the wisdom or expediency of such a provision. As Mr. Ramaswami Aiyangar, the learned advocate for the appellant, urges, it may be that the Legislature wanted to compel local authorities to make up their mind within a definite time either to take up the land trusting to the Courts not to compel them to pay more than a fair price. The award gives the authority concerned a fair idea of the sum which it may have to pay. The Courts may be trusted to act fairly, and the local authority must take up the property within the time fixed. As I said before I am not concerned with the policy of the Legislature. The proviso to section 34 is clear and unambiguous. Sections 16 and 17 lay down when title vests in the Government and section 48 gives a clear indication to this question.

The appellate Judge states that there is no provision compelling the Collector to take possession or to the effect that if he fails to take possession the award would become null and infructuous or that the properties would cease to vest in the Government. Here the Judge forgets that the vesting takes place only on taking possession. So before taking possession, there is no question of "title ceasing to vest." Title never vested before then. The argument that there is nothing to compel the Collector to take possession is quite in conformity with the provision in section 48 that the Government may withdraw from the acquisition at any time before taking possession and with the view laid down by the Judicial Committee in *Ezra* v. *Secretary of State for India*[1] that an award is nothing but an offer.

The decrees of the District Judge are reversed and those of the Subordinate Judge restored with costs throughout. Time for payment of costs three months. No leave.

V.S. *Appeals allowed.*

---

1. (1905) L.R. 32 I.A. 93 : I.L.R. 32 Cal. 605 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Nallakumara Goundan .. *Appellant**

v.

Pappayi Ammal and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 52—Suit for maintenance and for a charge—Amendment of plaint—Inclusion of additional items of property in the claim—Death of the defendant between the date of the application for amendment and of its being ordered—Transfer of the additional items by his legal representative prior to his being brought on record—Transfer affected by lis pendens.

A suit for maintenance was filed on the 10th of March, 1932, against *M*, and a charge was claimed against certain properties in his hands. On the 22nd of April, 1932, the plaintiff applied for an amendment of her plaint to include the three suit items of property and to claim a charge over them as well. The amendment was ordered on the 13th of August, 1932. In the meanwhile *M* had died in the beginning of May, 1932 and the application to add his legal representative filed on the 11th of July, 1932, was ordered on the 6th of August, 1932. After *M's* death his legal representative sold the three suit items of property on the 9th of June, 1932, to the 2nd defendant. The suit was ultimately decreed and a charge given over the three suit items of property. On the plaintiff being met with opposition in execution, she filed the present suit for declaration that she had a right to execute her decree against the three suit items of property.

Held, that the purchase by the 2nd defendant was affected by the doctrine of *lis pendens* and was therefore subject to the rights which were declared under the decree in that suit. The amendment ordered on the 13th of August, 1932, dated back to the 22nd April, 1932, the date of the application for amendment. The delay caused by the Court in ordering it ought not to prejudice the parties. The explanation added to section 52, Transfer of Property Act, by the amending Act of 1939 has made it clear that the doctrine of *lis pendens* applies to all alienations made from the date of the plaint itself.

It could not be said that the sale was not made by a party to the suit. When a party to the suit dies, the suit must be deemed to be pending against the legal *persona* of the deceased, *i.e.*, against his legal representative and must be deemed to continue until at least the expiration of the time limited by any law of limitation to bring him on record. If the legal representative makes an alienation prior to his being brought on record within the time allowed by law, it is really the deceased's legal *persona* that makes the alienation and it will be affected by *lis pendens*.

Appeal against the decree of the District Court, Coimbatore in A. S. No. 3 of 1940, preferred against the decree of the Court of the District Munsiff, Erode, in O. S. No. 517 of 1938.

The Advocate-General (*P. V. Rajamannar*) and *K. Subba Rao* for Appellant.

N. Somasundaram for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant in a suit for maintenance brought by the plaintiff first respondent is the appellant in this Court. The first respondent is the widow of one Chinnappa Goundan. Chinnappa Goundan and Muthuswami were brothers. They became divided under a partition deed Ex. D in the year 1919. At that time, their mother and grandmother and an aunt of theirs were alive. The properties now in suit and a house were set apart for the maintenance of the three ladies to be enjoyed by them for their life. Chinnappa, the plaintiff's husband, executed a will in favour of his brother Muthuswami. He directed the legatee to pay Rs. 17 to 20 per month to his wife the plaintiff for her maintenance. The will declared that if the legatee failed to pay the maintenance to his wife, she would have a right to recover it from the properties of Chinnappa Goundan which remained in the hands of the first defendant's father after paying his debts. It also provided that the land that was set apart at the time of the partition for the maintenance of his mother and aunt should go to the legatee after their life. The plaintiff filed a suit *in forma pauperis* on the 10th March, 1932, for maintenance against the first defendant's father Muthuswami claiming a charge over six items of properties. These items did not include the three items which had been set apart for the maintenance of the three ladies and which form the subject-matter of the present suit. By a subsequent amendment, the widow was allowed to include the three items now

* S. A. No. 616 of 1943. [illegible] 12th October, 1944.

in question and to claim a charge over these items as well. The application for amendment I. A. No. 386 of 1932 to include the additional items was filed on the 22nd April, 1932, and it was ordered on the 13th August, 1932. Muthuswami died in the beginning of May, 1932, and I. A. No. 421 of 1932 was filed on the 11th July, 1932, to implead his son as his legal representative and it was ordered on the 6th August, 1932. After the death of Muthuswami and before the application for adding his son as the legal representative, his son, the present first defendant, sold the three additional items and some other properties to the second defendant for Rs. 4,750 by a sale deed dated the 9th June, 1932. Ultimately the suit ended in a decree by which maintenance was decreed and made a charge on the items purchased by the second defendant. When the plaintiff attempted to execute her decree, she was met with opposition and her execution petition was dismissed. Then she filed the suit out of which this second appeal arises for a declaration that she has a right to execute the decree and to recover her decree amount from out of the suit properties. The suit was at first dismissed by the District Judge on appeal on the ground that the maintenance decree was a charge decree, that no claim petition lay in execution of such a decree as there was no attachment and that the order refusing execution against the properties could not be challenged by a suit under Order 21, rule 63. The trial Court had upheld the plaintiff's right to execute the decree against the properties but on appeal the decree was reversed and the suit dismissed on the ground mentioned above. The matter came before me in S. A. Nos. 124, 180 and 518 of 1941. I held that the suit might be treated as one for a declaration of the plaintiff's right to sell the properties in the hands of the second defendant in execution of her prior decree. The plaintiff had preferred one second appeal and the first and second defendants had each preferred a second appeal. All of them attacked the judgment of the District Court and all the appeals were allowed and the appeal was remanded for disposal on the question whether the plaintiff had a right to proceed against the suit properties in realisation of the amount due to her under the prior decree. This time it came before another District Judge and he upheld the right of the plaintiff to realise her decree amount from the half share of Chinnappa Goundan in the three items. This second appeal is preferred by the second defendant who is the purchaser at a private sale from the first defendant on the 9th June, 1932.

The view taken by the lower appellate Court is that the purchase by the second defendant is affected by the doctrine of *lis pendens* and is therefore subject to the rights which were declared under the decree in that suit. It is argued that this view is incorrect for two reasons: one is that the vendor the first defendant was not a party to the suit on the 9th June, 1932, when the sale was made by him. It is only a sale by a party to a suit that is affected by the doctrine of *lis pendens* enacted in section 52 of the Transfer of Property Act. The second ground is that the three properties now in suit had not become the subject-matter of the previous suit until the amendment was actually ordered which was on the 13th August, 1932.

Taking the latter point first, it is clear that the amendment application was filed on the 22nd April, 1932. The order made on the 13th August, 1932, will date back to the date of the application for amendment. No authority has been cited to show that where an application for amendment seeking to include some more properties is later on ordered, it is the date of the order that determines the question of *lis pendens*. This question as to what date an amendment order dates back, whether it is to the date of the application for amendment or to the date of suit has been considered and it has been held that it relates back to the date of the amendment application; if not to the date of the suit itself. So far as the doctrine of *lis pendens* is concerned, the proper view is that the order dates back to the date of the application for amendment. It is then that further immoveable properties were sought to be impleaded in the suit. An alienation made prior to the application will not be affected, but from the date when the application for amendment was made, it must be held that the question of *lis pendens* applies. The delay caused

by the Court in ordering the application ought not to prejudice the parties. An application for amendment is similar to the plaint. It is said that the defendants did not know that these properties were included until the amendment was ordered. But it would be seen that where in a plaint a right to immovable property is claimed, the defendant may not know of the institution of the suit until summonses are served on him and still the doctrine of *lis pendens* has been held to be applicable to an alienation made between the date of the suit and the date of the service of summons. This rule is based upon public policy that if an alienation subsequent to the date of the plaint is allowed, the plaintiff will have to bring the alienee on record every time such an alienation is made and there will be no end to litigation. It is in order to avoid that trouble the Legislature has enacted section 52 of the Transfer of Property Act and the matter is made clear that the doctrine of *lis pendens* applies to all alienations made from the date of the plaint itself. The explanation added to the section by the amending Act of 1939 says :

"For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction."

The next question is whether the sale was by a party to the suit. Section 52 in so far as it is relevant for this purpose says this :

"During the pendency in any Court . . . . of any suit or proceeding in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party . . . ."

It is very strenuously argued for the appellant that the sale in question was not made by a party to the suit. It is urged that on the 9th June, 1932, the vendor the first defendant herein had not been made a party to the previous suit, and that therefore the sale by him was not by a party to the suit. It is here necessary to observe that the properties are not joint family properties of the first defendant and his father Muthuswami. The half share against which the decree under appeal gives the plaintiff a right to get her decree amount is the half share which the plaintiff's husband Chinnappa Goundan had bequeathed to his brother Muthuswami. Therefore in the hands of Muthuswami, the suit properties were his self-acquired properties on his death which occurred before the 9th June, 1932, but after the 22nd April, and the properties devolved on the first defendant as the heir and legal representative of his father Muthuswami. Muthuswami was already a party to the suit. On my finding on the other point, there was a *lis* commenced against Muthuswami and a right to immoveable properties was directly and specifically in question in the suit against Muthuswami. On Muthuswami's death, the plaintiff has three months to bring his legal representatives on record. If the argument advanced by the appellant is accepted, it would follow that if the defendant in a suit relating to immoveable property dies, his legal representative can pass a good title to an alienee provided it was made before an application for impleading the legal representative is filed. Such a result is, I think, wholly opposed to the scheme of section 52. The real answer to the argument is to be found in the rule that where the property devolved on another by inheritance, the latter continues the legal *persona* of the deceased and that the property in the hands of the legal representative is subject to all the rights available to third parties against the deceased. It is strictly the continuation of the *persona* of the deceased in the heirs. We must therefore take it that though the alienation is made by the first defendant, it is really Muthuswami's legal *persona* that made the sale in question. It was held even prior to the amendment in 1929 that an alienation made by a party subsequent to the disposal of suit and before the presentation of an appeal was effected by the doctrine of *lis pendens*. Now by the amending Act of 1929 it is made clear that the *lis* commences from the date of the plaint and continues until the suit or proceeding has been disposed of by a *final decree* or order and complete satisfaction or discharge of such decree or order has been obtained or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof.

The final decree includes an appeal and a further appeal. The section as originally enacted did not contain this explanation and even then it was uniformly held that section 52 applied even to an alienation which was made between the disposal of the suit in the first Court and the presentation of an appeal to an appellate Court. The same principle should, I think, apply to a case where as here the original defendant died and the alienation was made after his death and before the filing of the application to bring his legal representative on record. The suit must be deemed to be pending against the legal *persona* of the deceased, *i.e.*, against his legal representative and must be deemed to continue until at least the expiration of the time limited by any law of limitation to bring him on record. Whether if an application is made long after the expiration of the time fixed for bringing the legal representative on record and an alienation is made by the legal representative and later on the plaintiff in the action seeks to set aside the abatement and to bring the legal representative on record and that is ordered, the doctrine of *lis pendens* applies or not does not arise and need not be considered. There may be difficulties in such a case, but where the alienation is made within the time prescribed for bringing the legal representative on record, it is a clear case and there can be no doubt whatever that the rule does apply. The effect of this will be that the execution petition filed in the previous suit will stand revived and further orders will have to be made on that execution application. The executing Court will on being apprised of the result of this litigation restore the execution petition to file and proceed to pass further orders in execution.

Another objection is that if the doctrine of *lis pendens* is held to apply in this case, the second defendant must be taken to be a representative of the party to the previous suit and that therefore the order made in execution of the previous decree should have been challenged only by a direct appeal and not by a separate suit. As the District Judge has pointed out this question ought to have been raised when the remand was made by this Court on the former occasion. The point was raised before the District Judge after remand by this Court. It is too late for the appellant to raise this question and I consider that the District Judge is right in disallowing this objection.

The second appeal fails and is dismissed with costs of the plaintiff first respondent. No leave.

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh at Lucknow.)

PRESENT :—LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Kunwar Rajendra Bahadur Singh . . . *Appellant**

v.

The Honourable Mr. Justice Kunwar Dalip Singh . . . *Respondent.*

United Provinces Encumbered Estates Act (XXV of 1934), *section* 14 (5)—*Construction and scope—Mortgage contract resulting from negotiations—If one made in the course of the "transaction"—Contract to treat accumulated interest as principal on* 31*st December,* 1916—*Can be given effect to.*

A contract for a mortgage is usually preceded by negotiations in which the amount to be advanced, rate of interest, and the nature of the security are arranged, and when such negotiations result in a mortgage contract, the contract can be correctly described as made in the course of the "transaction" within the meaning of section 14 (5) of the United Provinces Encumbered Estates Act of 1934. In any event where a mortgage is made in 1912 for which a mortgage of 1915 is substituted the later mortgage must be treated as made in the course of the "transaction."

There was nothing in the Encumbered Estates Act of 1934 to prevent effect being given to a contract to convert into principal interest in arrears on the 31st December, 1916.

---

* P. C. A. No. 7 of 1944. 19th March, 1945.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree dated 13th April, 1942, of the Chief Court of Oudh at Lucknow, which modified a judgment and decree dated 25th May, 1938, as amended by a judgment and decree dated 9th May, 1940, of the Special Judge, First Grade, Barabanki, under the United Provinces Encumbered Estates Act, 1934 (hereinafter referred to as "the 1934 Act"). The questions raised in the appeal relate to the construction and effect of the 1934 Act as amended by the United Provinces Encumbered Estates Amendment Act, 1939 (hereinafter called "the 1939 Act").

The facts giving rise to the appeal are not in dispute.

On the 23rd January, 1912, Raja Raghuraj Bahadur Singh borrowed Rs. 500,000 from Raja Sir Harnam Singh, carrying interest compoundable half-yearly on the terms of a mortgage deed. On the 20th October, 1915, Raja Raghuraj Bahadur Singh executed a fresh mortgage (hereinafter referred to as "the mortgage of 1915") in favour of Raja Sir Harnam Singh, in substitution for the mortgage of 1912 for securing Rs. 5,71,490-13-9 carrying interest at 6 per cent. per annum payable on the 30th June and 31st December, in each year, with a provision that if any half-yearly instalment of interest was not paid on the due date, it should be added to principal and carry interest at the rate of 6 per cent. per annum. The rate of interest was subsequently raised, but nothing turns upon this. On the 8th January, 1926, Raja Sir Harnam Singh obtained a preliminary decree on the mortgage of 1915, which decree was made final on the 26th February, 1927. In the year 1925, the mortgagor having died, his sons divided the estate and liabilities between themselves. One of the brothers paid off his share of the mortgage debt under the mortgage of 1915, and on the 17th October, 1929, the other son, namely, the appellant Kunwar Rajendra Bahadur Singh executed a fresh mortgage (hereinafter referred to as "the mortgage of 1929") in favour of Raja Sir Harnam Singh to secure the appellant's share of the mortgage debt amounting to Rs. 7,60,108-11-9. Interest was to be payable at the rate of 7 per cent. per annum and there was a provision for capitalising interest in arrear similar to that in the mortgage of 1915. In February, 1935, a decree for sale was made of the property comprised in the last mentioned mortgage.

In April, 1935, the Act of 1934 came into operation. By section 4, the right is given to any landlord who, or whose immoveable property, is encumbered by private debts, to make an application to the Collector of the District requesting that the provisions of the Act be applied to him. The Collector is required to forward the application to the Special Judge appointed under the Act. Section 14 provides for the hearing of the application by the Special Judge. Sub-sections (4) (*a*), (5) and (6) are in the following terms:

"(4) In examining each claim the Special Judge shall have and exercise all the powers of the Court in which a suit for the recovery of money due would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them, subject to the following provisions, namely :—

(*a*) the amount of interest held to be due on the date of application shall not exceed that portion of the principal which may still be found to be due on the date of application.

(5) For the purpose of ascertaining the principal under clause (*a*) of sub-section (4) the Special Judge shall treat as principal any accumulated interest which has been converted into principal at any statement or settlement of account, or by any contract made in the course of the transaction before December 31st, 1916.

(6) For the purpose of ascertaining the principal under clause (*a*) of sub-section (4) the Special Judge shall not treat as principal any accumulated interest which has been converted into principal at any statement or settlement of accounts or by any contract made in the course of the transaction after December 31st, 1916."

The effect of the Act seems to be that the Special Judge has to ascertain the principal sum due at the date of the application and, in so doing, disallow all interest capitalised, at any rate, after the 31st December, 1916. Once the principal sum has been so ascertained, it follows that the balance of the amount due, so far as the whole debt consists of capital and interest, and excluding other sums, which may

be due, *e.g.*, for costs, charges, and expenses, is attributable to interest, of which the amount recoverable is limited to a sum equal to the principal.

On October 30th, 1936, application under the Act was duly made and it is not contended that such application was out of time. The Special Judge determined the application on the 25th May, 1938. He held that of the amount secured by the mortgage of 1929, the principal sum comprised in the mortgage of 1915 represented principal and the balance interest. He then apportioned the principal sum between the present appellant and his brother in the proportions in which they had divided the liability under the mortgage of 1915 between them and on that basis he fixed the principal due by the appellant at Rs. 3,45,291-8-9, and held that the appellant was liable for payment of that sum for principal and a further sum of the same amount for interest. He also allowed certain sums for costs and fixed the total amount for which the appellant was liable at Rs. 7,02,140-8-6.

On the 29th September, 1938, the appellant presented a memorandum of appeal to the Chief Court of Oudh against this decision but, before the appeal came on for hearing, the Act of 1939 was passed on the 30th September, 1939.

That Act provided, in section 14, of the 1934 Act, for the words and figures "before December 31st, 1916" in sub-section (5) the words and figures "on or before December 31st, 1916" should be substituted, and an explanation was added to sub-section (5) in these terms:

"Interest which on or before December 31st, 1916, became part of the principal under the express terms of the original contract shall, for the purpose of this section, be deemed to be principal."

By section 22 a new section No. 20-A was added after section 20 of the 1934 Act which so far as material provided, that notwithstanding anything in the 1934 Act, if in the determination of any claim under the provisions of section 14 any interest had not been treated as principal solely on the ground that it was converted into principal on December 31st, 1916, or on the ground that it was converted into principal on or before December 31st, 1916, in accordance with an express term in the original contract, the amount due under such claim should be re-determined in accordance with the provisions of the Act.

The reason for the insertion of the explanation to section 14, sub-section (5) of 1934 Act would seem to have been that the Chief Court of Oudh, in the case of *Sundar Lal* v. *Kaniz Zohra Begum*[1] had decided that the contract referred to in sub-section (5) was a contract entered into after the original mortgage and did not include a provision for converting interest into principal contained in the original mortgage. This case will be considered later in this judgment.

On the 9th May, 1940, an application was made under section 20-A, sub-clause (4) of the 1939 Act to re-open the decision of the Special Judge of the 25th May, 1938. The application came before another Special Judge who added to the principal sum allowed by his predecessor unpaid interest which became payable between the date of the 1915 mortgage and the 31st December, 1916 and held that the amount to which the claimant mortgagees were entitled was Rs. 7,37,715-12-6. In fixing this amount the learned Judge, apparently by inadvertence, omitted to include the costs allowed by his predecessor.

The appeal to the Chief Court against the order of the 25th May, 1938, came on for hearing on the 13th April, 1942, and was treated as an appeal both against the order of the 25th May, 1938, and the order of re-determination of the 9th May, 1940. The appeal was dismissed, and cross-objections asking for the costs allowed at the first hearing and omitted by inadvertence on the re-determination were allowed. In dismissing the appeal the learned Judges of the Chief Court expressed the view that the principal sum allowed by the first Special Judge was at too low a figure. Their Lordships have felt some difficulty in following the views of the

1. (1939) I.L.R. 14 Luck. 430.

learned Judges of the Chief Court upon this point, but as there was no appeal against the amount at which the principal sum had been fixed by the Special Judge the observations were unnecessary for the determination of the appeal and need not be further considered.

On this appeal the only point which has been seriously argued is that the amendments to the 1934 Act made by the 1939 Act are *ultra vires* in so far as they are retrospective, by reason of the provisions of section 292 of the Government of India Act, 1935. That section provides :

"Notwithstanding the repeal by this Act of the Government of India Act, 1915, but subject to the other provisions of this Act all the law in force in British India immediately before the commencement of part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent legislature or other competent authority."

The argument is that if a law be altered retrospectively, it has, in effect, not continued in force until altered by a competent legislature. Their Lordships find it unnecessary to determine this question because in their view retrospective provisions of the 1939 Act have no effect on the rights of the parties to this litigation. In their Lordships' view the case of *Sundar Lal v. Kaniz Zohra Begum*[1] is open to serious criticism. The Court in that case discussed with some precision the meaning of the word "course" in the expression "in a contract made in the course of the transaction" but they did not discuss the meaning of the word "transaction," and assumed it to refer only to the ultimate written contract. A contract for a mortgage is usually preceded by negotiations in which the amount to be advanced, rate of interest, and the nature of the security are arranged, and their Lordships think that when such negotiations result in a mortgage contract, the contract can be correctly described as made in the course of the transaction. But, however that may be, in the present case the mortgage transaction unquestionably commenced in 1912 when the original mortgage was entered into for which the mortgage of 1915 was substituted. It seems to their Lordships clear that the mortgage of 1915 was a contract made in the course of the transaction within the meaning of section 14 (5) of the 1934 Act and the first Special Judge was in error in not allowing capitalised interest under the mortgage of 1915 down to and including the 31st December, 1916. It may be noticed that the Act of 1934 was silent as to interest converted into principal on the 31st December, 1916, and there was nothing in the Act to prevent effect being given to the contract between the parties as to such interest. But their Lordships agree with the Chief Court in thinking that the first Special Judge must be treated as having disallowed interest because it had been converted into principal on or before December 31st, 1916, in accordance with the express term in the original contract, and the matter was therefore rightly re-determined by the second Special Judge under section 20-A of the 1939 Act.

For these reasons their Lordships will humbly advice His Majesty that this appeal be dismissed with costs.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Kunnatan Vittil Chandu Kutty Nayar and another .. *Appellants**

v.

Karayat Gopalan Nayar and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), section 21—Suit by wrongly evicted tenant for restoration of the holding—It is not essential that all the tenants should join in the suit where there are joint tenants.

Where there are joint tenants all of them need not join in a suit under section 21 of the Malabar Tenancy Act for the restoration of possession of the holding from which they have been wrongly evicted by the jenmi who has granted a lease of the holding to another after the eviction.

1. (1939) I.L.R. 14 Luck. 430.

*A. A. O. No. 571 of 1944. 22nd March, 1945.

Appeal against the order of the District Court, North Malabar, dated 3rd July, 1944, and made in A. S. No. 120 of 1944 (O. S. No. 301 of 1943, District Munsiff Court, Quilandy).

S. Venkatachala Sastri for Appellants.

C. K. Viswanatha Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiffs in this suit are brother and sister. With their brother Chathu *alias* Cheriyomana Nair, they formed a tarwad. On the 25th August, 1939, the first defendant granted a kanom demise to the plaintiffs and Chathu in respect of the property in suit. In O. S. No. 747 of 1940 in the Court of the District Munsiff of Quilandi, the first defendant obtained a decree for possession of the property on the ground that he wished to cultivate it himself. He obtained possession but he did not continue to cultivate the land. In or about the month of August, 1942, he granted an oral lease of the property to the second defendant and on the 9th February, 1943, he executed a registered lease in his favour. Thereupon the plaintiffs filed the present suit under section 21 of the Malabar Tenancy Act for restoration to them of the land from which they were evicted. Originally there were only two defendants; the jenmi and his lessee. Subsequently the heirs of Chathu were added as defendants 3 to 7. The first and second defendants averred that the suit was not maintainable because two of the former tenants had not joined in as plaintiffs. In their written statement, the third, fourth and sixth defendants intimated that they did not wish to recover possession of the property. The fifth and seventh defendants stated that they had no objection to the suit being decreed.

The District Munsiff held that the suit was not maintainable and consequently dismissed it. On appeal the District Judge of North Malabar reversed the decree of the District Munsiff on the ground that the suit was maintainable by the plaintiffs irrespective of the attitude adopted by some of the legal representatives of Chathu. Accordingly he remanded the suit to the District Munsiff for disposal according to law. The first and second defendants have appealed. The appeal came in the first instance before Chandrasekhara Aiyar, J., who at the suggestion of the appellants directed that it should be placed before a Bench. In his order the learned Judge intimated, however, his agreement with the opinion of the District Judge.

Sub-section (1) of section 21 of the Malabar Tenancy Act states that in a case in which eviction is obtained on the ground specified in clause (5) of section 20 (the clause which was relied upon by the jenmi when suing for eviction), and the landlord who obtains the eviction transfers any of the lands to a person "on any kind of lease or mortgage with possession or on kanom, kuzhikanom or verumpattam, within six years of the eviction, the tenant shall be entitled to sue for the restoration to him of the possession of all the lands from which he has been evicted and to hold them with all the rights and subject to all the liabilities of a tenant."

This right is subject to the provisions of section 43. Sub-section (2) of that section, shorn of its proviso, which does not apply here reads as follows:

"If there are intermediaries between the landlord who has obtained the eviction and the person who cultivates the land, all persons whose interests in the holding are terminated by the eviction shall be entitled to be restored to the respective interests they had at the time of the eviction as if there had been no eviction, and in case any one of them does not claim restoration the tenant next below him shall be entitled to claim such restoration and hold the land (*a*) on the terms on which the person not claiming the land held it, if he and the claimant belonged to the same class, or (*b*) on the terms on which the claimant held it if he and the person who did not claim the land belonged to different classes."

The case for the appellants is that as section 21 speaks of "the tenant" this must mean that where there are joint tenants all of them must join in before there can be a decree for the restoration of possession. This argument is a plausible one, but when the question is examined fully in the light of the whole Act it cannot be accepted. The main object of the Act is to secure fixity of tenure for tenants and section 43

gives clear indication that if one tenant does not wish to avail himself of the provisions of section 21 another tenant can do so ; of course, on the same terms as before. If the argument advanced on behalf of the appellants were to be accepted, it would mean that where a lease has been granted to a tarwad, say, of fifty members, the fact that one of them refuses to join in the suit for restoration would defeat the forty-nine other members. Such a situation could not have been intended by the framers of the Act. The word "tenant" is defined in section 3 and it is in the widest possible terms. It means any person who has paid or has agreed to pay rent or other consideration for his being allowed by another to enjoy the land of the latter and includes an intermediary, a kanomdar, a kuzhikanomdar, and a verumpattamdar of any description.

We consider that the fact that three of the legal representatives of Chathu do not wish to have the tenancy restored does not mean that Chathu's brother and sister cannot have restoration of the holding on the same terms as they hold it before they were wrongly evicted by the first appellant. That they were wrongly evicted is quite clear. The jenmi did not in fact require the land for his own cultivation. This is shown by the grant of a lease of it to the second defendant soon after the eviction.

For these reasons, the appeal is dismissed with costs in favour of the plaintiffs (respondents).

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Gnanasoundari .. *Petitioner**

v.

Nallathambi *alias* Jokiam Jebamalai and others .. *Respondents.*

Christian Marriage Act (XV of 1872), section 88—Scope—Roman Catholic marrying Protestant wife in a Protestant Church without a dispensation as required by the Canon Law of the Church of Rome—Marriage if void as forbidden by the "personal law" of the husband—Second marriage by husband during lifetime of such wife—Offence of bigamy—Release by wife in favour of husband—If can operate as dissolution of marriage—Penal Code (XLV of 1860), section 494.

N, who was baptised a Roman Catholic, after the death of his Roman Catholic wife married *G*, a Protestant in a Protestant Church, the ceremony being performed by a Protestant Pastor. Later *G* executed a release deed in favour of *N* who then married *X* in a Roman Catholic Church, the ceremony being performed by a Roman Catholic priest. *G* then filed a complaint charging *N* and *X* with the offence of bigamy and the priest who solemnised their marriage with abetment of the offence. The defences raised were (1) that the release deed operated as a dissolution of the marriage according to the custom of the community to which the parties belonged and (2) that the marriage with *G* was not a valid one by reason of the provisions of section 88 of the Indian Christian Marriage Act as the Canon Law of the Church of Rome which was *N's* personal law forbade the marriage of a Roman Catholic with a Protestant without a dispensation and forbade absolutely the marriage of a Catholic with a Protestant in a Protestant Church by a Protestant Pastor.

Held, the marriage between *N* and *G* having been solemnised as required by the Indian Christian Marriage Act it subsists unless it is dissolved or declared null and void and there is nothing in the Indian Divorce Act which permits the dissolution of a legal marriage between Christians by virtue of any custom applicable to either or both of the parties to the marriage. The custom is not a part of the personal law of the parties which invalidates the marriage *ab initio* so as to afford a defence to the accused. The marriage to attract the provisions of section 88 of the Indian Christian Marriage Act must be a nullity according to the personal law of the party. That part of the personal law of the parties only is contemplated by the section which relates to absolute impediments to any marriage at all between the parties, (even marriage according to the rights of their own churches) impediments such as prohibited degrees of consanguinity or affinity. Accordingly there was a valid marriage between *N* and *G* subsisting when *N* married *X* and the accused were guilty of the offence charged. *Saldanha v. Saldanha*, (1929) I.L.R. 54 Bom. 288, relied on and *Lopez v. Lopez*, (1885) I.L.R. 12 Cal. 706 (F.B.) referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Special First Class Magistrate of Devakottai in C. C. No. 76 of 1944.

---

*Crl. R. C. No. 881 of 1944. 29th March, 1945.
(Crl. R. P. No. 826 of 1944).

O. T. G. Nambiar instructed by *Messrs. King and Partridge* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

A. S. Sivakaminathan and *A. Dorairaj* for Respondents.

The Court made the following

ORDER.—This is a petition to revise the judgment of the Special First Class Magistrate, Devakottai, in Calendar Case No. 76 of 1944, by which he has acquitted the first and third accused in that case. The 1st accused was baptised a Roman Catholic and married his first wife in a Roman Catholic Church. The complainant P. W. 1 is a protestant and in 1930, after the death of his first wife, the 1st accused married her in a Protestant Church, the ceremony being performed by a Protestant Pastor. Two children were born of the marriage. On 19th May, 1942, the complainant executed a release deed Ex. 1, in favour of the 1st accused—the relevance of this deed will appear later. On 16th September, 1943, the 1st accused married the 2nd accused in a Roman Catholic Church, the ceremony being performed by the 3rd accused, a Roman Catholic Priest. Thereafter on 14th December, 1943, P. W. 1 filed a complaint in the Court of the Joint Magistrate of Ramnad charging the 1st and 2nd accused with the offence of bigamy punishable under section 494 of the Penal Code, and the 3rd accused with abetment of the offence.

Section 494 of the Indian Penal Code reads :

> " Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished, etc."

The marriage between the 1st accused and the complainant in 1930 was a marriage solemnised under the provisions of the Indian Christian Marriage Act (Act XV of 1872). Section 1 of that Act states that the Act " extends to the whole of British India " and section 4 provides that :

> " Every marriage between persons one or both of whom is (or are) a Christian or Christians, shall be solemnised in accordance with the provisions of the next following section ; and any such marriage solemnised otherwise than in accordance with such provisions shall be void."

It is not disputed that the marriage between the accused and the complainant was solemnised in accordance with the provisions of section 5 of the Act. A marriage solemnised under the provisions of the Indian Christian Marriage Act subsists so that any second marriage by either of the parties to the first marriage during the lifetime of the other party is void unless the marriage has been dissolved under the provisions of section 10 of the Divorce Act or declared null and void under section 18 on any of the grounds set out in section 19. It may be conceded, however, that a person accused of an offence under section 494, I.P. Code, may plead in his defence that the first marriage was null and void even though he has not obtained a declaration to that effect under section 18 of the Divorce Act. In the present case the 1st and 3rd accused raised two defences: First that the marriage of the 1st accused to the 2nd was not in any case void because the release deed—Ex. I—executed by the complainant operated as a dissolution of the marriage between the 1st accused and herself according to the custom of the community to which they both belonged ; and, secondly, that the marriage in 1930 was not a valid marriage by reason of the provisions of section 88 of the Indian Christian Marriage Act. The 2nd accused was discharged on the ground that there was no proof that she knew of the 1st accused's previous marriage and her case is not before me.

The learned Magistrate has not specifically found that the release deed operated as a dissolution of marriage so that the marriage between the 1st and 2nd accused was not void ; but he has treated it as a point in favour of the first accused. It might perhaps have been taken into consideration on a question of sentence, but it should not have been allowed to affect the question whether the 1st accused had committed the offence charged or not. The custom is not of course a part of the personal law of the parties which invalidates the marriage *ab initio*, and there is nothing in the Indian Divorce Act which permits the dissolution of a legal marriage between Christians by virtue of any custom applicable to either or both of the parties

to the marriage. The marriage of the 1st accused to the 2nd accused was not, therefore, a valid marriage simply by reason of the release deed executed by the complainant.

The point then has now been reached that if the marriage between the 1st and 2nd accused is not void it can only be because the earlier marriage between the 1st accused and the complainant was not a valid marriage by reason of the provisions of section 88 of the Indian Christian Marriage Act. Section 88 of the Act reads :

> "Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

It is contended for the accused that the personal law of the 1st accused who was baptised a Roman Catholic is the Canon Law of the Church of Rome and that the Canon Law forbids the marriage of a Roman Catholic with a Protestant without a dispensation and forbids absolutely the marriage of a Catholic with a Protestant in a Protestant Church by a Protestant Pastor. For the complainant it is argued that "personal law" in section 88 does not mean the whole of the personal law of the party or parties applicable to marriage but only such parts of the personal law as prohibit any marriage between the parties. The personal law contemplated, it is said, if section 88 is construed in its proper context and having regard to the Act as a whole, is that part of the personal law which relates to impediments which prohibit the marriage of the parties absolutely, such impediments as that given as the marginal note to section 88 that the parties are "within prohibited degrees" of consanguinity or impediments of a like absolute character such as idiosy, impotence, or infancy. In support of his argument learned counsel for the complainant relies on the decision of the Bombay High Court in *Saldanha* v. *Saldanha*[1]. The contention put forward for the accused is supported mainly on the ground that, according to the ordinary rules of construction, "the personal law applicable to either of the parties" will not bear the restricted meaning put on the words by the complainant.

Before considering *Saldanha* v. *Saldanha*[1] it will be convenient to refer to an earlier decision of the Calcutta High Court in *Lopez* v. *Lopez*[2]. In *Lopez* v. *Lopez*[2], it was pleaded by the defendant in a suit for restitution of conjugal rights that his marriage to the plaintiff was null and void as she was his deceased wife's sister. The case turned on whether the English law with regard to prohibited degrees applied or the personal law of the defendant who was a Roman Catholic. If the English law, as it then stood, applied, the marriage was null and void ; but under the personal law of the defendant, which was held to be the Canon Law, a valid marriage could be contracted if a dispensation had been granted. It was held that the defendant's personal law applied and, in the absence of evidence, the dispensation was presumed. The case is not precisely in point. What was decided was, first, that the personal law of the party with regard to prohibited degrees was the personal law of the community to which the party belonged and not the personal law of English Christians on the footing that the personal law of English Christians had become the personal law of all Christians domiciled in India ; and secondly, that the personal law of a Roman Catholic governing religious matters is the Canon law. The question, however, of the scope of section 88 was not considered. The case decided no more than that a marriage solemnised under the Indian Christian Marriage Act is invalid if the relationship of the parties to it is within the prohibited degrees according to the personal law of either of the parties.

Saldanha v. *Saldanha*[1] is more directly in point. In that case two Roman Catholics were married in due form under the Christian Marriage Act before a Registrar in accordance with the provisions of part V of the Act. Shortly afterwards, the husband was married again to another woman in a Catholic Church by a Catholic priest. The wife of the first marriage brought a suit for a declaration of the validity of her first marriage and for restitution of conjugal rights and at the same time the

1. (1929) I.L.R. 54 Bom. 288. 2. (1885) I.L.R. 12 Cal. 706 (F.B.).

husband was prosecuted for bigamy. The suit was decreed for the plaintiff but in the criminal case the husband was acquitted. The defendants appealed against the decree in the civil suit and the Provincial Government appealed against the acquittal of the husband in the criminal case. Both appeals were heard by a Bench of the Bombay High Court which consisted of *Blackwell* and *Kemp* Justices. The argument advanced for the husband was that he was governed by the Canon Law which forbade Roman Catholics to marry otherwise than "*In facie ecclesiae*" so that his first marriage was invalid under the provisions of section 88 of the Indian Christian Marriage Act. The learned Judges agreed in dismissing the civil appeal and in allowing the appeal of the Government against the acquittal of the husband. *Blackwell, J.*, held that section 88 did not cover any prohibition as to the form of marriage and drew attention in regard to the law of marriage to the distinction between the *lexi loci contractus* and the *lex domicilii.* He pointed out that it was impossible to suppose that the legislature in an act dealing with the forms of marriage of Christians could by section 88 have intended to enable parties to rely upon a prohibition as to form imposed by their personal law so as to invalidate the marriage. He concluded that the expression "personal law" in section 88 as not limited to the personal law as to prohibited degrees but would include any personal law apart from any personal law as to the form of marriage, which forbade either of the parties to enter into a contract of marriage with one another. *Kemp, J.*, considered that the Canon Law did not in fact prohibit the marriage. He also expressed the opinion that although the personal law referred to in section 88 of the Indian Christian Marriage Act is to be found, as far as Catholics are concerned in the Canon Law, *Lopez* v. *Lopez*[1] was no authority for the proposition that the expression "personal law" incorporates the whole of that personal law.

Except for the fact that it is not in every respect on all fours with the present case I should be content to follow *Saldanha* v. *Saldanha*[2] and say no more. In *Saldanha* v. *Saldanha*[2] however both parties were Catholics and the marriage was before a Registrar; in the present case one of the parties was baptised a Catholic while the other was a Protestant and the marriage was solemnised in a Protestant Church. In *Saldanha* v. *Saldanha*[2] therefore, the objection to the marriage in the eyes of the Church or according to the Canon Law could be nothing more than an objection to the form of the marriage. As *Kemp, J.*, pointed out prior to the marriage before the Registrar there was nothing in the personal law of the parties which forbade their marriage. In the present case there is not only the question of the form of the marriage in a Protestant Church and so not *in facie ecclesiae*, but the marriage was between a Catholic and a Protestant which is forbidden by the Canon Law without a dispensation. *Saldanha* v. *Saldanha*[2] governs the facts of the present case to this extent, that the marriage between the first accused and the complainant is not invalid merely because it was solemnised in a Protestant Church. The question remains whether a marriage between a Catholic and a Protestant without a dispensation is void according to the personal law applicable to Catholics so that, under the provisions of section 88, it cannot be validated by anything in the Indian Christian Marriage Act. Although in *Saldanha* v. *Saldanha*[2] only the form of the marriage was in question, the view expressed by *Kemp, J.*, with which I respectfully agree, that section 88 relates to impediments to marriage and that not all the impediments enumerated in the Canon Law are necessarily attracted by the section, affords guidance for the construction of the section as a whole. The words "Nothing in this Act shall be deemed to validate any marriage" presuppose that the marriage is not merely forbidden by the personal law of a party but that it is, according to that personal law, a nullity. Is then the impediment under the Canon Law to the marriage of a Catholic and a Protestant without a dispensation an impediment covered by the expression "personal law" in section 88,

1. (1885) I.L.R. 12 Cal. 706 (F.B.). 2. (1929) I.L.R. 54 Bom. 288.

and does the impediment, according to the Canon Law, render a marriage between a Catholic and a Protestant no marriage at all?

A Christian or Christians can only contract a legal marriage in India under the provisions of the Indian Christian Marriage Act. All the provisions of the Act apply to Christians of all denominations except Part VI, which deals with the marriage of native Christians, and which it is stated "shall not apply to marriages between Roman Catholics" except "so much of sections 62 and 63, as are referred to in section 64." Section 88 is the last section of the Act and appears in part VIII which is headed "Miscellaneous." Now it would certainly be surprising, having regard to the scheme of the Act and the position of section 88, in it, if the provisions of section 88 should make it impossible for a Catholic and a Protestant to marry at all except in accordance with the provisions of the Canon Law. This cannot have been contemplated by the legislature, and the difficulty is obviated if an interpretation is put on the section which, in my opinion, does no violence to the words used, namely, that, as the marriage to attract the provisions of section 88 must be a nullity according to the personal law of a party, that part of the personal law of the parties only is contemplated by the section which relates to absolute impediments to any marriage at all between the parties, even marriage according to the rites of their own churches, impediments such as prohibited degrees of consanguinity or affinity.

That this view is correct appears in my opinion, from a consideration of the question from the point of view of whether the Canon Law does in fact forbid a Catholic and a Protestant to enter into a marriage, on a proper construction of these words in their context in section 88 of the Act. The marriage which under section 88 will be invalidated if the personal law applicable to either of the parties forbade them to enter into it is a marriage which, but for the personal law of the parties is a legal and valid marriage according to the law of India. For such a marriage to be deemed not to be valid, however the scope of section 88 is regarded, it is clear that the personal law of a party must not only forbid the party to enter into the marriage but must hold such a marriage not to be a legal marriage but to be null and void *ab initio*. But does the Canon Law forbid a Roman Catholic to enter into a marriage with a Protestant except after a dispensation has been granted and in a Catholic Church in this sense? I do not think that it does and certainly it was not proved in this case that it does. Father Kalathil, Professor of Theology in the St. Paul's Seminary at Trichinopoly gave evidence for the defence as D. W. 9. He referred in his examination-in-chief to Canons 1094, 1060, 1061, 1325, 1099 and other Canons and stated no doubt that a Catholic and a Protestant could not enter into a valid marriage except under a dispensation from the Church got under Canon 1061. But it is clear that what he meant was that they could not enter into a valid marriage in the eyes of the Church. In his cross-examination he said that he was not informed about any prior marriage of the first accused; and then, and this shows clearly that he was not contending for the position that the 1st accused was at liberty to marry another woman because the earlier marriage was forbidden by the Canon Law, "The civil powers are competent to legislate as regards the effects of matrimony." A marriage, as has already been pointed out, must be a nullity according to the personal law of either of the parties to it before any question of its being validated by reason of anything contained in the Christian Marriage Act can arise; and, for the reasons given, I do not think that tha Catholic Church holds a marriage between a Catholic and Protestant solemnised in any of the ways provided by the Indian Christian Marriage Act to be a nullity as a Civil Marriage by virtue of the Canon Law and I am quite clear that it has not been proved that the Catholic Church holds such a marriage to be a nullity. This supports the conclusion, reached by other means, that the expression "personal law" in section 88 means the personal law of either party which relates to absolute impediments to any marriage between the parties. All that was intended to be

done or was done as is pointed out in *Lopez* v. *Lopez*[1] by the changes introduced by the Indian Divorce Act of 1869 and the Indian Christian Marriage Act of 1872 taken with section 88 of the latter Act was to provide that the law applicable to such absolute prohibition of any marriage between parties as prohibited degrees of consanguinity or affinity was not the personal law of Christians in England but the personal law applicable to either of the parties. Section 88 of the Indian Christian Marriage Act in my judgment has no wider scope.

It follows from what has been said above that the marriage between the 1st accused and the complainant was a legal and valid marriage, that it was subsisting when the 1st accused married the 2nd accused and that the marriage of the 1st accused with the 2nd accused was void by reason of its taking place during the life of the complainant. This being so, the 1st accused committed the offence defined in section 494 of the Penal Code, and the judgment of the Special first Class Magistrate of Devakottai acquitting him was wrong. With regard to the third accused his acquittal necessarily followed on the finding of the Magistrate that the first accused had not committed bigamy; but the Magistrate also found that there was no proof that he knew that the complainant was alive when the marriage of the 1st accused with the 2nd was performed. In view of his defence to the charge and the written statements filed by him it may seem that it would not have affected his conduct even if he had known that P. W. 1 was alive. On the finding of fact, however, he was in any event entitled to be acquitted of the offence of abetment of bigamy, and, as I am sitting in revision, I am not disposed to interfere. It does not affect the case against the 3rd accused, but I may perhaps observe that it seems not improbable that the marriage of the 1st accused with the second was in fact permitted and performed because of the custom in the community to which the 1st accused belonged, in respect of which there was evidence, to regard a release deed such as Ex. I as constituting a valid dissolution of the marriage between the parties. The extreme claim made that the marriage between the 1st accused and the complainant was invalid even as a civil marriage according to the Canon Law was possibly an afterthought.

With regard to the 1st accused I am quite clear, for the reasons given above, that he should have been convicted of an offence under section 494 of the Indian Penal Code and that the order of the First Class Magistrate of Devakottai acquitting him was wrong. In the exercise of my revisional jurisdiction, however, I cannot myself convict the accused. I can only order a retrial. The principle involved in this case is important, but I do not think that it is necessary to take a serious view of the offence committed by the first accused. He seems to have thought that he was entitled to marry again because of the release deed according to the custom of his caste, and it also seems to have been the opinion of his spiritual advisers that he was entitled to marry again. In the circumstances, it does not seem to me necessary or desirable that the first accused should be put on his trial again, and I understand that a retrial of the case is not desired by the petitioner. All that is desired is that the principle should be established that in the circumstances of this case the offence of bigamy was committed. If, however, a retrial is not directed, the only alternative is to dismiss the petition.

The petition is therefore dismissed, but I would make it clear that it is dismissed only for the reason that in the special circumstances of this case a retrial is neither necessary nor desirable.

K.S. *Petition dismissed.*

---

1. (1885) I.L.R. 12 Cal. 706 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE YAHYA ALI.

Minor Ramalingam represented by next friend Somu Pillai .. *Appellant**

v.

Minor Venkatachalam represented by Court guardian Mr. T. R. Venkatarama Ayyar and another .. *Respondents.*

Hindu Law—Minor—Decree against—Suit to set aside on the ground of gross negligence of guardian—Guardian's duties in defending suit.

In a suit by the indorsee of a promissory note against a minor as the legal representative of his father, the promissory note having been executed by the father who was dead at the time of the suit, a decree was passed against the minor limiting his liability to the family properties and to the separate assets of his father in his hands. The minor filed a suit seeking to set aside the decree on the ground that there had been gross negligence on the part of the guardian in the conduct of that suit.

Held, that having regard to the conflict of decisions at the time of the institution of the suit as regards the right of an indorsee of a promissory note to sue coparceners other than those executing the promissory note, it could not be said that the pleader who was instructed by the minor's guardian was grossly negligent in not objecting to the frame of the suit. The guardian having discharged his duty by engaging a properly qualified person who was not grossly negligent, it cannot, in any event, be said that the guardian was grossly negligent.

Daiva Ammal v. *Selvaramanuja*, A.I.R. 1936 Mad. 479, followed; *Subbaratnam Chettiar* v. *Gunavanthalal Vidyasankar*, (1937) 1 M.L.J. 224, considered. *Appa* v. *Ramanathan*, (1942) 1 M.L.J. 155 : I.L.R. (1942) Mad. 526, referred to.

Appeal against the decree of the District Court of East Tanjore at Negapatam dated the 11th day of December, 1943, and made in A. S. No. 89 of 1943, preferred against the decree of the Court of the District Munsiff of Tiruturaipundi in O. S. No. 132 of 1942.

R. Sundaralingam for Appellant.

T. N. Sundaresa Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is a minor. He sued in the Court of the District Munsiff of Tiruturaipundi for a declaration that a decree passed against him in Small Cause Suit No. 91 of 1937 on the file of the Subordinate Judge's Court of Tiruvarur was not binding upon him because of the gross negligence of his guardian in the conduct of that suit. On the 30th April, 1934, the plaintiff's father executed a promissory note in favour of one Muniammal. The plaintiff was joint with his father. On the 2nd September, 1934, Muniammal endorsed the promissory note to her father, the first defendant. In 1937, the first defendant filed the suit in which the decree now complained of by the plaintiff was passed. The father had died before the institution of that suit and the plaintiff was sued as the surviving coparcener and the legal representative of his father. A decree was passed against him on the 12th November, 1937, but was limited to the family properties and to the separate assets of his father in his hands. The present suit was filed on the 10th August, 1942. The District Munsiff held that there had not been gross negligence in the conduct of the Small Cause Court Suit and relied on the judgment of Madhavan Nair, J., in *Daiva Ammal* v. *Selvaramanuja*[1]. Consequently he dismissed the suit. His decision was concurred in by the District Judge of East Tanjore. The plaintiff has now appealed to this Court. The appeal has been placed before a Bench because the opinion expressed by Madhavan Nair, J., in *Daiva Ammal* v. *Selvaramanuja*[1] is in conflict with the opinion expressed by Varadachariar, J., in *Subbaratnam Chettiar* v. *Gunavanthalal Vidyasankar*[2].

This Court has always held that a minor can sue to set aside a decree passed against him in a suit, not only on the ground of fraud or collusion, but also on the ground of gross negligence on the part of his guardian in the conduct of the suit.

---

* S. A. No. 1143 of 1944. 13th March, 1945.

1. A.I.R. 1936 Mad. 479.
2. (1937) 1 M.L.J. 224.

The latest judgment of this Court on the question was given in *Egappa* v. *Ramanathan*[1]. *Daiva Ammal* v. *Selvaramanuja*[2] was decided by a Division Bench composed of Madhavan Nair and Stone, JJ. In delivering the judgment of the Bench, Madhavan Nair, J., said :

"It is not proved that the lawyer was not provided with sufficient funds to conduct the case. In these circumstances, is it reasonable to hold that the guardian has been grossly negligent in the conduct of the case if the lawyer fails to raise a point of law which may well have been raised by him? We think not. It was observed in In re *Speight* : *Speight* v. *Gaunt*[3], that a trustee is bound to conduct the business of trust in the same way as an ordinary prudent man of business conducts his own and has no further obligation. In In re *Weall* : *Andrews* v. *Weall*[4], it was pointed out that a trustee may select solicitors and agents and so long as he selects persons properly qualified he cannot be made responsible for their intelligence and honesty. We think the same may be said about the guardian of a minor also. In the circumstances of this case we think the guardian has done what could reasonably be expected of her, that she has defended the case with due care and that it will be improper to ascribe negligence to her in conducting it."

In *Subbaratnam Chettiar* v. *Gunavanthalal Vidyasankar*[5], Varadachariar, J., who was sitting alone, expressed the opinion that a minor can raise the plea of gross negligence notwithstanding that his guardian is not aware of the law or of the material facts in the case. It would appear that the learned Judge was of the opinion that where the guardian has taken legal advice and has acted on it he is not relieved of responsibility in the event of the practitioner being grossly negligent in tendering the advice.

As the decision in *Daiva Ammal* v. *Selvaramanuja*[2] is that of a Division Bench, it is binding on us, as it was on the Court below. We may add that in our judgment it cannot be said that there was gross negligence in the conduct of Small Cause Suit No. 91 of 1937. As we have mentioned, the decree in that case was passed on the 12th November, 1937. By that date, the judgment of the Full Bench of this Court in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[6] had not been delivered. It was not delivered until the 15th December, 1937. Before that date there was a conflict in the decisions of this Court on the question whether a member of a joint Hindu family could be sued on a promissory note executed by the head of the family alone. In *Nataraja Naicken* v. *Ayyaswami Pillai*[7] a Division Bench had held that an indorsee of a promissory note executed by a member of a joint Hindu family could sue not only the maker, but the other members of the family on the instrument. This decision was wrong and was overruled by the Full Bench which decided *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[6], where it was held that the indorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note, unless the indorsement is so worded as to transfer the debt as well, and the stamp law also is complied with. As there was a conflict of decisions on this question when the Small Cause Suit No. 91 of 1937 was being tried it could not be said with reason that the pleader who was instructed by the minor's guardian was grossly negligent in not objecting to the frame of the suit. As the pleader was not grossly negligent, it cannot in any event be said that the guardian was grossly negligent.

For these reasons, the appeal is dismissed with costs.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Shanmugham *alias* Muthukaruppan .. *Appellant*.*

*Court-fees—Mortgage decree—Assignment—Order for personal decree—Appeal against—*Ad valorem *court-fee payable—Civil Procedure Code (V of 1908), Order 21, rule 16 and Order 34, rule 6.*

---

1. (1942) 1 M.L.J. 155 : I.L.R. (1942) Mad. 526.
2. A.I.R. 1936 Mad. 479.
3. (1883) 22 Ch.D. 727.
4. (1889) 42 Ch.D. 674.
5. (1937) 1 M.L.J. 224.
6. (1938) 1 M.L.J. 378 : I.L.R. (1938) Mad. 568 (F.B.).
7. (1916) 32 M.L.J. 354.

* S. R. No. 7438 of 1945. 9th April, 1945.

The order sought to be appealed against was made by the Subordinate Judge on an application by an assignee decree-holder for the recognition of the assignment in his favour and for passing a personal decree, the application purporting to be one under Order 21, rule 16 and Order 34, rule 6 of the Civil Procedure Code. The Court granted a personal decree for the amount claimed personally against the first defendant and against the joint family properties of defendants 1 and 2. In his appeal petition, the first defendant-appellant attacked not only the assignment of the decree but the personal decree itself.

Held, that as the appellant sought to attack the personal decree he should prefer a regular appeal paying *ad valorem* court-fee, and that he could not prefer a civil miscellaneous appeal with a lesser court-fee.

Muhammad Iltifat Husain v. *Alim-un-Nissa Bibi*, (1918) I.L.R. 40 All. 553, relied on.

Appeal against order sought to be preferred to the High Court against the order of the Court of the Subordinate Judge of Madura dated 24th October, 1944, and made in E. A. No. 106 of 1944 in O. S. No. 139 of 1926.

K. S. Ramabhadra Aiyar for Appellant.

The Government Reader (*K. Kuttikrishna Menon*) on behalf of the Government.

The Court made the following

ORDER.—The question is whether the appellant is entitled to file a civil miscellaneous appeal and pay court-fee accordingly or whether he must file a regular appeal and pay an *ad valorem* court-fee. The order made by the Subordinate Judge against which it is now sought to appeal was made on an application by an assignee-decree-holder for recognition of the assignment in his favour and for passing a personal decree; and the application was stated to be made under Order 21, rule 16 and Order 34, rule 6 of the Code of Civil Procedure. The order of the Principal Subordinate Judge was that a personal decree was granted for the amount claimed personally against the first defendant and against the joint family properties of defendants 1 and 2. In his appeal petition, the appellant attacks not only the assignment of the decree but the personal decree itself. It was held by the Allahabad High Court in *Muhammad Iltifat Husain* v. *Alim-un-Nissa Bibi*[1] that an order on an application for a decree under Order 34, rule 6 of the Civil Procedure Code is a "decree" as that term is defined in the Code and that therefore an appeal from such an order must bear an *ad valorem* court-fee stamp. This decision, to the best of my knowledge, has always been followed in practice in this Court. It is not necessary to decide what would be the position if the appellant had confined his appeal grounds to an attack on the assignment of the decree. As already stated he attacks the personal decree itself and, that being so, he cannot be permitted to file a civil miscellaneous appeal and pay the lesser court-fee merely because in one application orders were prayed for an assignment of the decree under Order 21, rule 16 and for a personal decree under Order 34, rule 6. The view taken by the office is correct and *ad valorem* court-fee as for a regular appeal must be paid.

Two weeks is allowed for payment of court-fee.

B.V.V. —————— *Order made.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HAPPELL.

Kandimalla Thirupelu and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), sections 190 (c), 436 and 437—Sessions Judge's direction to Magistrate to make further inquiry in order to take cognizance of a more serious offence of the accused than that for which they had been charged—Whether such an order was sustainable—Magistrate himself whether could take cognizance of the offence for which accused was not charged.

Under section 436, Criminal Procedure Code, a Sessions Judge may direct further inquiry into the case of a person who has been discharged; and under section 437 he can order the commitment of a person who has been discharged instead of directing a fresh inquiry. There appears, however, to be no provision of law which enables a Sessions Judge either to take cognizance of an offence himself or to direct a Magistrate to take cognizance of an offence.

1. (1918) I.L.R. 40 All. 553.

* Crl. R. C. No. 178 of 1945. 29th March, 1945.
(Crl. R. P. No. 167 of 1945).

Where a Sessions Judge directed a Taluk Second Class Magistrate to hold a further inquiry and consider whether there were or were not grounds for inquiring into a charge against the accused of a more serious character than the charge in respect of which they were committed,

Held, that the order of the Sessions Judge could not be supported. The Magistrate himself could have no doubt in the course of the inquiry taken cognizance of the offence upon his knowledge or suspicion under section 190 (*c*) of the Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions of the Cuddapah Division dated 8th February, 1945, and passed in Sessions Case No. 61 of 1944 (P. R. C. No. 3 of 1944, Taluk Second Class Magistrate's Court, Pulivendla).

V. T. Rangaswami Aiyangar and *P. Ram Reddy* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The order of the learned Sessions Judge directing the Taluk Second Class Magistrate of Pulivendla to hold a further inquiry and consider whether there are, or are not grounds for inquiring into a charge against the accused of a more serious character than the charge in respect of which they were committed cannot be supported. The Sessions Judge made the order because in the course of the examination of P. W. 1, it appeared that in connection with the transaction in which P. W. 1 was himself injured a certain Sultan had been killed. No charge-sheet, however, was framed in connection with the death of Sultan and the accused were not committed on any charge connected with his death. Under section 436 of the Code of Criminal Procedure a Sessions Judge may direct further inquiry into the case of a person who has been discharged; and under section 437 he can order the commitment of a person who has been discharged instead of directing a fresh inquiry. There appears, however, to be no provision of law which enables a Sessions Judge either to take cognizance of an offence himself or to direct a Magistrate to take cognizance of an offence. A Sessions Court is not a Court of first instance. In the present case, the murder, if it was a murder of Sultan would constitute a separate offence from the attempted murder of P. W. 1; and the order of the Sessions Judge in effect directs the Magistrate to take cognizance of the offence. The Magistrate himself no doubt in the course of the inquiry could have taken cognizance of the offence upon his own knowledge or suspicion under section 190 (*c*) of the Code of Criminal Procedure and having taken cognizance, if he was satisfied that a *prima facie* case had been made out on the evidence, he could have committed the accused. He did not, however, do this. The petition is allowed and the order of the Sessions Judge under reference is set aside. He will now proceed to try the accused in the Sessions case committed to him.

K.C. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE KUNHIRAMAN.

Kandadai Narasimhachariar .. *Appellant**

v.

Raghava Padayachi .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rules* 58 *and* 63—*Order on claim petition or decree in suit filed under rule* 63 *does not extend beyond the execution of the decree which has given rise to those proceedings.*

Rule 58 of Order 21 of the Code of Civil Procedure only applies to a claim preferred or an objection made to the order of attachment in the particular execution proceedings. The statement in rule 63 that an order passed on the claim objection shall, subject to a suit, be conclusive must be read in conjunction with rule 58 which speaks of "such attachment." It cannot be said that the order is conclusive for all purposes inside and outside the particular execution proceedings. It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned, but where the property is sold in execution proceedings arising out of an entirely different decree the claimant will not be precluded from setting up his title as against a

*L. P. A. No. 4 of 1945. 19th April, 1945.

stranger purchaser. If the attachment has not led to the sale of the property all those concerned, even if there has been a suit under rule 63, will be left in the same position as they were before the attachment, except that the decree-holder will be at liberty to institute fresh proceedings in execution of the same decree without any right remaining in the claimant to reagitate his claim.

Singariah Chetty v. *Chinnabbi*, (1920) 40 M.L.J. 7 : I.L.R. 44 Mad. 268, overruled and *Kumara Goundan* v. *Thevaraya Reddi*, (1924) 48 M.L.J. 616, commented upon.

Appeal under clause 15 of the Letters Patent against the decree of the High Court in S. A. No. 1639 of 1943 (Somayya, J.) preferred against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 59 of 1942, preferred against the decree of the Court of the District Munsiff of Cuddalore in O.S. No. 355 of 1939.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Appellant.

R. Sriramachari for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether an order passed dismissing an objection preferred to an attachment under Order 21, rule 58 of the Code of Civil Procedure, no suit having been filed under rule 63, operates beyond proceedings in execution of the particular decree.

On the 13th September, 1919, Perianna Padayachi (the father of defendants 1 to 3), the fourth defendant and one Sengeni Padayachi executed a mortgage in favour of the plaintiff. Some of the mortgaged properties belonged to Perianna Padayachi, some to the fourth defendant and some to Sengeni Padayachi. On the 7th July, 1939, the mortgagee sued to recover the amount then due on the mortgage. With interest it came to Rs. 1,998. The properties owned by Sengeni Padayachi were sold in public auction by the revenue authorities for the recovery of land revenue and were purchased by the mortgagee, subject to his mortgage. Credit for the amount paid by the mortgagee for these properties was given to the mortgagors.

In original suit No. 183 of 1932 of the Court of the District Munsiff of Cuddalore the mortgagee obtained a decree on a mortgage of other property executed by the fourth defendant and Sengeni Padayachi. The hypotheca was sold, but the proceeds were not sufficient to pay in full the mortgagee, who was granted a personal decree for the balance. In execution of this decree the mortgagee attached as the separate property of the fourth defendant items 11 to 14 of the properties covered by the mortgage to the plaintiff of the 13th September, 1919. The fourth defendant's brothers, defendants 7 to 9, objected to the attachment. They said that these particular properties belonged to the joint family of which they and the fourth defendant were members. The objection prevailed, but the mortgagee did not file a suit under the provisions of Order 21, rule 63 of the Code of Civil Procedure to challenge this finding because he had obtained full satisfaction of the personal decree passed in Original Suit No. 183 of 1932 out of the properties owned by Sengeni Padayachi. Consequently the attachment came to an end.

In the present suit defendants 7 to 9 again advanced the plea that items 11 to 14 belonged to their joint family, but the District Munsiff held against them. He also held that the order passed on the objection raised by them in the execution proceedings arising out of the personal decree obtained in Original Suit No. 183 of 1932 did not disentitle the mortgagee to a mortgage decree in respect of items 11 to 14. On appeal by defendants 7 to 9 the Subordinate Judge agreed with the District Munsiff that items 11 to 14 belonged to the fourth defendant in his own right, but found that the District Munsiff erred in holding that the claim order did not operate as a bar to the suit to this extent. The decision of the Subordinate Judge on this question was in accordance with the judgment of this Court in *Singariah Chetty* v. *Chinnabbi*[1]. The mortgagee then appealed to this Court, but the appeal was dismissed by Somayya, J., as he was also bound by the decision in *Singariah Chetty* v. *Chinnabbi*[1]. The learned Judge doubted, however, the correctness of the judgment in that case and he gave the plaintiff leave to appeal under clause 15 of the Letters Patent. Hence the present appeal.

1. (1920) 40 M.L.J. 7 : I.L.R. 44 Mad. 268.

Order 21, rule 58 says that where a claim is preferred or an objection is made to the attachment of a property attached in execution of a decree on the ground that the property is not liable to "such attachment" the Court shall proceed to investigate the claim or objection. Rule 63 says that a party aggrieved by the order passed in these proceedings may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of any such suit, the order shall be conclusive.

The provisions contained in these and the intermediate rules are confined to the claim or objection preferred to the particular attachment. In *Singariah Chetty* v. *Chinnabbi*[1], Ayling and Odgers, JJ., held, however, that an order on a claim petition which has not been set aside in a suit by the claimant under Order 21, rule 63, becomes conclusive not only for the purpose of the execution of the decree in connection with which the claim was preferred, but also of the execution of other decrees between the same parties. That appeal arose out of a suit on a mortgage bond executed by the guardian of the first and second defendants in favour of the plaintiffs. The suit was O. S. No. 158 of 1916 of the District Munsiff's Court, Tirupathi. In O. S. No. 872 of 1913, the fifth defendant, who was there suing the first and second defendants, obtained an order for attachment before judgment. The plaintiffs objected to the attachment by reason of their mortgage, but their objection was overruled. Thereupon the plaintiffs filed O. S. No. 919 of 1914 for a declaration of their mortgage rights and for a further declaration that these were not affected by the attachment. This suit was dismissed without a decision on the merits. The plaintiffs were granted leave to withdraw it conditionally on payment of the costs of the defendants ; but as they failed to pay the costs within the time allowed, a formal decree was passed dismissing it. The property which the plaintiffs claimed was not, however, sold as the result of the attachment before judgment which the fifth defendant had obtained in O. S No. 872 of 1913. It was sold in execution of a decree which the fifth defendant had obtained against the first and second defendants in another suit—O. S. No. 69 of 1914. The purchasers at the Court auction were the third and fourth defendants. When the plaintiffs sued on their mortgage the third and fourth defendants pleaded that the dismissal of O. S. No. 919 of 1914 precluded the plaintiffs from suing on their mortgage, and this Court accepted the contention, holding that the word 'conclusive' in rule 63 of Order 21 precluded them from re-agitating their right to the mortgage in any other proceedings. The learned Judges considered *Umesh Chunder Roy* v. *Raj Bullabh Sen*,[2] a decision of the Calcutta High Court which was in conflict, but apparently they thought that it was distinguishable.

In *Umesh Chunder Roy* v. *Raj Bullabh Sen*[2] in execution of a decree for arrears of rent, the decree-holder attached a tenure belonging to the judgment-debtor who, pending the attachment, sold it. The purchaser applied for an order raising the attachment, but the application was dismissed on the ground that the alienation had been made pending the attachment. The decree-holder did not, however, proceed with the execution proceedings because the amount due to him was paid by the judgment-debtor. Some years later the heirs and successors in title of the decree-holder obtained another decree for arrears of rent against the same defendant, and in execution thereof attached the same tenure. The purchaser objected, but his application was rejected. Thereupon he brought a suit to establish his right to the property and to confirm his possession. It was contended that the order dismissing his application when he applied for the release of the first attachment operated as *res judicata*. This was rejected on the ground that when the decree-holder was paid off he had no further claim and that the present suit arose out of a subsequent decree and a subsequent attachment. The effect of this judgment is that a summary order passed on a petition preferred under Order 21, rule 58 is only conclusive for the purposes of the proceedings in which it is given and if the attachment is raised it can be ignored. The Bombay High Court followed *Umesh Chunder*

1. (1920) 40 M.L.J. 7 : I.L.R. 44 Mad. 268. 2. (1882) I.L.R. 8 Cal. 279.

Roy v. *Raj Bullabh Sen*[1] in *Ibrahim Bai* v. *Kabula Bai*[2], as did the Lahore High Court in *Udho Das* v. *Khair Mohammad*[3].

The decision in *Singariah Chetty* v. *Chinnabbi*[4] has been criticised by this Court. The criticism is to be found in the judgment of Ramesam, J., sitting with Venkatasubba Rao, J., in *Kumara Goundan* v. *Thevaraya Reddi*[5]. Mr. Justice Ramesam was of the opinion that an order passed in a claim inquiry did not continue to be operative after the cessation of the attachment in a case where no suit was filed, but he thought that the filing of a suit under Order 21, rule 63 made all the difference.

We consider that the criticism of *Singariah Chetty* v. *Chinnabbi*[4] is well founded. As we have pointed out, rule 58 of Order 21 only applies to a claim preferred or an objection made to the order of attachment in the particular execution proceedings. The statement in rule 63 that an order passed on the claim or objection shall, subject to a suit, be conclusive must be read in conjunction with rule 58 which speaks of 'such attachment.' We think that it would be unreasonable to hold that the intention of the Legislature was to make the order conclusive for all purposes inside and outside the particular execution proceedings. Of course, if the dismissal of the claim or objection resulted in the property being sold in execution, the title claimed by the objector would pass to the purchaser at the Court-auction ; but we are not considering a case of that nature. The Court is concerned merely with a case where the execution proceedings have not resulted in a sale. If the dicision in *Singariah Chetty* v. *Chinnabbi*[4] were allowed to stand, it would mean that a person in the position of the plaintiff would not be able to enforce his mortgage, notwithstanding that the decree-holder who instituted the execution proceedings had been satisfied by the judgment-debtor by the payment of the decretal amount and the payment had resulted in the attachment being raised. It must be remembered that the mortgagee's cause of action is on his mortgage, which is quite distinct from the cause of action leading to the execution proceedings.

In *Velu Padayachi* v. *Arumugham Pillai*[6], Sadasiva Ayyar, J., said :

> "The auction-purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant."

The learned Judges who decided *Singariah Chetty* v. *Chinnabbi*[4] considered the judgment of Sadasiva Aiyar, J., and were of the opinion that it applied to the case before them. We accept the observations of Sadasiva Ayyar, J., as embodying a correct statement of the law, but we are unable to agree that they support the decision in *Singariah Chetty* v. *Chinnabbi*[4]. The property mortgaged to the plaintiffs in that case was not sold in the execution proceedings which gave rise to the suit under Order 21, rule 63. The mortgaged property was sold in execution proceedings founded on a different decree obtained by the fifth defendant. The mortgagees were not parties to those proceedings. The purchasers at the Court-auction, the third and fourth defendants were not parties to the suit under Order 21, rule 63, and could not claim to be the representatives of the decree-holder. Therefore, a plea of *res judicata* did not lie. For the reasons which we have given in the course of this judgment we are constrained to hold that *Singariah Chetty* v. *Chinnabbi*[4] was wrongly decided.

The opinion expressed by Ramesam J., in *Kumara Goundan* v. *Thevaraya Reddi*[5] that the filing of a suit under Order 21, rule 63 makes all the difference cannot be accepted without qualification. It is conclusive between the parties to the suit or their representatives so far as the execution of the particular decree is concerned; but where the property is sold in execution proceedings arising out of an entirely different decree the claimant will not be precluded from setting up his title as against

1. (1882) I.L.R. 8 Cal. 279.
2. (1888) I.L.R. 13 Bom. 72.
3. A.I.R. 1942 Lah. 192.
4. (1920) 40 M.L.J. 7 : I.L.R. 44 Mad. 268.
5. (1919) 38 M.L.J. 397.
6. (1924) 48 M.L.J. 616.

a stranger purchaser. If the attachment has not led to the sale of the property all those concerned, even if there has been a suit under rule 63, will be left in the same position as they were before the attachment, except that the decree-holder will be at liberty to institute fresh proceedings in execution of the same decree without any right remaining in the claimant to reagitate his claim. Subject to the operation of the doctrine of *res judicata* in any particular case, we hold that an order on a claim petition filed under Order 21, rule 58, or a decree in a suit filed under rule 63 does not extend beyond the execution of the decree which has given rise to those proceedings.

The result is, the appeal will be allowed with costs in the Subordinate Court, in the second appeal and in this appeal. The case will have to be remanded to the Subordinate Court to hear and decide the further issues in the light of this judgment. The costs in the trial Court and of the further hearing in the Subordinate Court will be decided by the Subordinate Judge.

The appellant is entitled to the refund of the court-fee paid on the memorandum of appeal in the second appeal and to the refund of the court-fee paid on the memorandum of appeal in the appeal under the Letters Patent.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

The Shanmugham Rubber Estate Kaulalampur, by partner, Sri SP. S. RM. Ramaswami Chettiar .. *Respondent.*

Income-tax Act (XI of 1922), *section* 4-*A* (b)—*Residence in British India—Test—Partnership to acquire and work rubber plantation in Malacca—Provision for control of business by two of the partners in rotation—One of the controlling partners residing in British India during the accounting period—Evidence of consultation of that partner by his agent at Malacca in reference to this business—Inference—Section* 66 (1)—*Question of law—Question as to the proper effect of a proved fact—Power of Court to correct wrong conclusions drawn from admitted or proved facts.*

A partnership to acquire and work a rubber plantation in Malacca provided for two of the partners having control of the partnership business in rotation. During the period of account one of the controlling partners was admittedly resident in British India. It was also in evidence that his agent in Malacca had prior to the period of account written to him for directions in regard to the partnership business. On a question as to whether in the circumstances the firm was resident in British India under section 4-A (*b*) of the Income-tax Act,

Held, that the materials for drawing the conclusion with regard to the control of the business are the terms of the partnership deed, the residence of the controlling partner in British India during the year of account and the fact that he had been asked by his agent for directions in an estate matter and that in the circumstances the assessee was resident in British India within the meaning of section 4-A (*b*) of the Income-tax Act.

Held further, that the proper effect of a proved fact is a question of law and the High Court in a reference under section 66 (1) of the Act was entitled to correct wrong conclusions drawn from admitted or proved facts.

Case referred to the High Court by the Income-tax Appellate Tribunal, Calcutta Bench, under section 66 (1), Indian Income-tax Act (XI of 1922) in Application No. 66, R. A. No. 43, Madras of 1943-44 on its file.

C. S. Rama Rao Sahib for Applicant.

P. R. Srinivasan for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this reference is whether the respondent firm was resident in British India within the meaning of section 4-A (*b*) of the Indian Income-tax Act. That section says that for the purposes of the Act a Hindu undivided family, firm or other association of persons is resident in British India unless the control and management of its affairs is situated wholly without British India. In other words, if the control and management of its affairs is partly within

* Case Referred No. 25 of 1944. 29th March, 1945.

British India the family, firm or association of persons as the case may be, is deemed to be resident in British India for the purposes of the Act.

The partners in the assessee firm are six Nattukottai Chettiars. The partnership was formed on the 19th December, 1935, for the purpose of acquiring and working a rubber plantation in Malacca known as the Shanmugham Rubber Estate. The partnership deed provided that two of the partners should in rotation have control of the partnership business. All the partners had money-lending businesses in the Federated Malay States and the deed permitted a controlling partner to act, if he so desired, through the agent of his own money-lending business in that country. This provision, however, would not affect the legal position if the controlling partners or one of them was resident in British India and retained control of his agent. In this case the question does not, however, turn, on whether the controlling partners acted through their individual agents and therefore no further reference need be made to this matter.

The year of account was the year 1940-41. The controlling partners during that period were M. RM. S. Chockalingam Chettiar and SP. M. Ramanathan Chettiar. The former lived throughout the year at Karaikudi in this presidency. The latter lived in the Native State of Pudukottah which lies some 25 miles away from Karaikudi. The Income-tax Officer held that the firm was resident in British India within the meaning of section 4-A (*b*) because part of the control was exercised by M. RM. S. Chockalingam Chettiar from Karaikudi. On an appeal by the assessee the Appellate Assistant Commissioner held that there was no control exercised from British India and this opinion was accepted by the Appellate Tribunal. The reference has been made at the instance of the Commissioner of Income-tax, Madras, under section 66 (1) of the Act, as the Commissioner maintains that wrong conclusions have been drawn from admitted or proved facts. The question referred is widely drawn and is in these terms :

"Whether in the circumstances of the case the respondent firm was resident in British India under section 4-A (*b*) of the Act?"

In holding that there had been no control exercised in British India the Appellate Assistant Commissioner was impressed by the fact that no letters had been produced which showed that M. RM. S. Chockalingam Chettiar had exercised control during the period of account. The assessee firm maintained that no copies of letters written from British India to the persons in charge of the plantation had been kept. Considering that the partners are Nattukottai Chettiars who are very careful in business matters, this is hard to believe; but for the purpose of deciding this reference we will assume it to be true that no copies were kept. Several letters written from the agents of the partners in Malacca were produced and one written by the agent of M. RM. S. Chockalingam Chettiar, dated the 4th May, 1939, showed that he was seeking instructions with regard to a sum of Rs. 5,000 which represented profits which had been made by the estate. He said that large areas were to be replanted and agreements with the contractors must be drawn up. Each partner might have to contribute to the expenses and he wanted the sanction of his principal for the employment of the Rs. 5,000 for the purpose of the replanting. This letter shows that when it was necessary, the controlling partner in British India was consulted and asked to give his directions. As we have indicated, this letter was not written during the period of account, but it has not been suggested that there was any change in the system of control made during that period. Inasmuch as the partnership deed provided for the control of two partners and one of the controlling partners was resident in British India, the proper inference to be drawn, especially when the letter of the 4th May, 1939, is borne in mind is that part of the control at any rate was within British India. The Appellate Assistant Commissioner in the course of his order said that it was reasonable to infer that the *locus* of control was usually in Malacca where also all the partners were when the partnership agreement was drawn up and the business was started. We cannot accept this as the proper inference to be drawn. As we have indicated, the material for drawing the conclusion with regard to the control are the terms of the partnership deed, the

residence of Chockalingam Chettiar in British India during the year of account and the fact that he had been asked by his agent for directions in an estate matter.

The Appellate Tribunal accepted the Appellate Assistant Commissioner's inference from the proved facts as being correct and in upholding his order went on to state that inasmuch as the partnership deed provided for the exercise of control by two partners, one partner acting alone could not manage. This statement is obviously erroneous. The partnership deed did not provide that in acts of control both partners should signify their agreement. There would be control within the meaning of section 4-A (*b*) if one partner took part in the direction or management of the estate.

It has been said on behalf of the assessee that as the Income-tax Appellate Commissioner held that there was no control exercised in British India and the Tribunal has accepted this finding, no question of law arises. This argument loses sight of the fact that the proper effect of a proved fact is a question of law, as the Privy Council had occasion to point out in *Dhanna Mal* v. *Moti Sagar*[1]. On the proved facts the Income-tax Appellate Tribunal was not entitled to conclude that there was no control exercised in British India. There is here a question of law and in this reference we are entitled to correct the mistake. In fact, the Tribunal has asked us to state whether in the circumstances of the case the respondent was resident within British India within the meaning of the section. We have no hesitation in holding that the assessee was so resident. The respondent will pay the Commissioner's costs, Rs. 250.

On several occasions this Court has had to draw the attention of the Commissioner of Income-tax to the inconvenience caused to it by Income-tax Officials giving only the Tamil dates in orders passed by them and we have requested the Commissioner to see that the English dates are always given as well. The Court has been assured that this will be done. In the order of the Appellate Assistant Commissioner in this case numerous Tamil dates are referred to without the corresponding English dates being given. This has caused delay in the hearing of the case because we have had to pause to obtain from Mr. Rama Rao Sahib the corresponding English dates. The Commissioner has control over the Income-tax Officers and the Appellate Assistant Commissioner in these matters and we trust that in future he will see that his orders in this respect are obeyed.

V.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Sinna Ranga Boyan and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 403 and Penal Code (XLV of 1860), sections 147, 148, 323 and 324—Applicability of section 403, Criminal Procedure Code—Convictions for offences under sections 147 and 148, Penal Code—Appellate Court setting it aside and remanding case for fresh disposal in respect of offences under sections 323 and 324—Order without jurisdiction—Fresh disposal would be trial for the same offence within the meaning of section 403 (1), Criminal Procedure Code.

Convictions for offences under sections 147 and 148, Penal Code, were set aside by the Sessions Judge in appeal and the case was remanded for fresh disposal, since the Judge thought that the evidence showed that offences under sections 323 and 324, Penal Code, had been committed. On a question as to the legality of the order,

Held, that the Sessions Judge had no jurisdiction to remand the case for fresh disposal. If the accused are re-tried they would in fact be being tried again for the same offence within the meaning of section 403 (1), Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Sessions of Coimbatore Division passed in C. A. No. 114 of 1944, dated 28th July, 1944 (C. C. No. 35 of 1944, Additional First Class Magistrate, Erode).

V. T. Rangaswami Aiyangar for *K. Kalyanasundaram Aiyar* and *A.N. Rangaswami* for Petitioners.

---

1. (1927) 52 M.L.J. 663 : L.R. 54 I.A. 178 : I.L.R. 8 Lah. 573 (P.C.).

* Crl. R. C. No. 744 of 1944. 24th November, 1944.
(Crl. R. P. No. 702 of 1944).

The Assistant Public Prosecutor (*N. Somasundaram*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioners were convicted by the trial Court for offences under sections 147 and 148 of the Indian Penal Code. On appeal to the Sessions Judge of Coimbatore, the convictions for the offences under sections 147 and 148 of the Indian Penal Code were set aside because in the opinion of the Sessions Judge, there was no proof that any more than three persons took part in beating the complainant. The Sessions Judge, although he set aside the convictions, remanded the case for fresh disposal, since he thought that the evidence showed that offences under sections 323 and 324, Indian Penal Code, in respect of which no charges were framed had been committed. In my judgment the learned Sessions Judge had no jurisdiction to remand the case for fresh disposal. If the petitioners are now to be tried for offences under sections 323 and 324 of the Indian Penal Code, they would be being tried on the same facts as the facts which formed the subject-matter of the case under sections 147 and 148, Indian Penal Code, and in respect of offences for which charges might have been framed in the case in which they have been acquitted. They will in fact be being tried again for the same offence within the meaning of section 403 (1) of the Code of Criminal Procedure.

The order of the Sessions Judge directing remand of the case for fresh disposal is therefore set aside. The acquittal of the accused is confirmed and their bail bonds will be cancelled.

V.S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Cherutti *alias* Raman Nair .. *Appellant**

v.

S. Saraswathi Ammal and others .. *Respondents.*

Malabar tarwad—Karnavan—Removal from office—Subsequent execution of puramkadam—Suit by melcharthdar for redeeming kanom—Validity of puramkadam whether can be gone into—Succeeding karnavan disowning transaction—Effect.

The plaintiff who was a melcharthdar sued to redeem a kanom executed by the previous karnavan of a Malabar tarwad. The first defendant who was the kanomdar contended that the amount due to him was not what the plaintiff said was due but much more because of a later puramkadam arrangement. The fifth defendant who was the succeeding karnavan joined with the plaintiff in contending that the puramkadam arrangement was not binding on the tarwad inasmuch as it was executed by the previous karnavan after he was removed from his office.

Held, that under the circumstances the plaintiff though a third party was entitled to impugn the binding nature of the puramkadam arrangement.

Thayyil Mammad v. *Purayil Mammad*, (1920) 39 M.L.J. 702 : I.L.R. 44 Mad. 140 ; *Imperial Bank of India, Jullunder* v. *Mst. Maya Devi*, (1934) I.L.R. 16 Lah. 714 ; *Govind Gurunath* v. *Deekappa Mallappa*, A.I.R. 1938 Bom. 388 and *Ram Kumar* v. *Mohanlal*, A.I.R. 1940 Pat. 270, referred to.

Appeal against the decree of the District Court, South Malabar, dated 13th October, 1943, and passed in A. S. No. 210 if 1942, preferred against the decree of the Court of the District Munsiff, Calicut, in O. S. No. 1122 of 1940.

C. K. Viswanatha Aiyar for Appellant.

K. P. Ramakrishna Aiyar and *D. H. Nambudripad* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant is the appellant and the only question is whether a puramkadam advance of Rs. 400 made by him on 9th February, 1923, to Damodaran Nambudiri said to be the then karnavan of the fifth defendant's tarwad is binding against the plaintiff. The plaintiff is the melcharthdar claiming under Ex. P-2, dated 25th October, 1938. She filed the suit to redeem the original kanom evidenced by Ex. P-1 dated 12th May, 1920, which was for a sum of Rs. 100 and a purapad of 62 paras of paddy. In answer, the first defendant set up that he was entitled to be paid the puramkadam advance also, which he gave to Damodaran Nambudiri under Ex. D-1. Both the Courts have held that the puramkadam

---

* S. A. No. 772 of 1944. 22nd March, 1945.

advance is not binding against the plaintiff, as it was made contrary to the terms of a karar, Ex. D-4, entered into between the members of the fifth defendant's tarwad on 11th November, 1919, under which it was agreed that no debts could be borrowed for the tarwad except by the consent of all the adult members of the tarwad. The lower Courts have found that the first defendant had notice of this karar. In fact, the kanom deed, Ex. P-1, refers to this karar, Ex. D-4. The conclusion was therefore reached that the puramkadam advance was not binding on the fifth defendant's tarwad and on the plaintiff who claimed as melcharthdar.

Mr. Viswanatha Aiyar, the learned Advocate for the appellant urged that a stranger to the family like the plaintiff melcharthdar cannot question the binding character of the puramkadam arrangement evidenced by Ex. D-1 entered into by the karnavan of the tarwad and that the right to challenge such a transaction was personal only to the other members of the illom and cannot be conveyed to third parties. In this connection he cited the decisions in *Govind Gurunath* v. *Deekappa Mallappa*[1], *Ram Kumar* v. *Mohanlal*[2], *Imperial Bank of India, Jullunder* v. *Mst. Maya Devi*[3] and *Thayyil Mammad* v. *Purayil Mammad*[4]. The position he took up was that the transaction which was voidable and not void could be avoided, if at all, only by the junior members of the tarwad or by the succeeding karnavan, and so long as this was not done, it was not open to a melcharthdar like the plaintiff to question it. The cases cited support this position undoubtedly. Unfortunately for the appellant, in the case before us, the tarwad karnavan, the fifth defendant has challenged the puramkadam arrangement as one not binding on the tarwad. He has stated in his written statement that the original intention was that he should join the plaintiff in the institution of the suit, but that he could not meet the plaintiff, the suit was filed by her alone and that he was prepared to join her in the suit and he even wanted to be transposed as plaintiff. In the Patna case cited above, this point about the members of the family challenging or not challenging the alienation is specially referred to as a point of distinction. It is not necessary that the member who impugns the alienation should file a suit for the purpose. He can set up the non-binding character of the transaction in defence and this is what has happened in the present case. No question of limitation can arise, as this is not a suit to set aside any alienation made by a karnavan. It is a suit for redemption of a kanom where the kanomdar states that the amount due to him is not what the plaintiff says is due but much more, because of the later puramkadam arrangement. It is open to the fifth defendant and the plaintiff to plead in defence to this claim urged by the first defendant for more money that the arrangement is not binding.

Further, having regard to the terms of the karar, Ex. D-4, it is open to doubt whether the puramkadam transaction is only voidable or is totally invalid. It is not a case where the karnavan exceeds his authority and enters into an arrangement on behalf of the tarwad without necessity. It is a case where he has no authority at all, having been dethroned from the karnavasthanam owing to reasons with which we are not concerned and having relinquished the place in favour of another, namely, the fifth defendant; and the agreement is that no debts shall be borrowed so as to bind the tarwad unless all the adult members agree and join in the execution of the necessary documents or deeds. If a person has notice of this karar and enter into an arrangement with one only of the members of the tarwad—in this case it was Damodaran Nambudiri who gave up the karnavanship altogether—he cannot be heard to say that it was a transaction which was valid until set aside. He entered into the arrangement with a person, who, he knew, had no authority whatever to take a puramkadam loan.

I agree with the lower Courts in holding that the puramkadam advance under Ex. D-1 is not binding on the tarwad of the fifth defendant and on the plaintiff, who claims as melcharthdar from the fifth defendant and dismiss this second appeal with costs. No leave.

B.V.V. ——— *Appeal dismissed.*

1. A.I.R. 1938 Bom. 388.
2. A.I.R. 1940 Pat. 270.
3. (1934) I.L.R. 16 Lah. 714.
4. (1920) 39 M.L.J. 702 : I.L.R. 44 Mad. 140.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Rashid Jamshed Sons & Co., by its Proprietor, S. R. Ahestani .. *Appellants**

v.

Moolchand Jothajee .. *Respondent.*

Arbitration Act (X of 1940), sections 14, 31, 32 and 33—Scope—Award—Enforcement—Procedure—Application under the Act and not a separate suit is the remedy.

A separate suit does not lie to recover a sum of money adjudged by an award in favour of a party to an arbitration to which the Arbitration Act of 1940 applies. The successful party is confined to the remedy by way of an application under the Arbitration Act itself. Even questions raised in defence as to the existence, validity or effect of the award cannot be gone into by any Court other than "the Court" indicated in the Act, that is, the Court in which the award may be filed.

Nanhalal Anandi v. *Singhai Gulabchand*, I.L.R. 1944 Nag. 340, not followed. *Deoki Nandan* v. *Basantlal Ghansyamdas*, I.L.R. (1941) 2 Cal. 123, applied.

Appeal against the decree of the Principal Judge of the City Civil Court, Madras, dated 21st August, 1944, in O. S. No. 851 of 1941.

S. Srinivasaraghavan and *K. Vaitheeswaran* for Appellants.

Subramanyan and *Rajagopal* for Respondent.

The Court delivered the following

JUDGMENT.—The question involved in this appeal is whether a separate suit lies to enforce the reliefs granted by an award passed under the Indian Arbitration Act (X of 1940) or whether the procedure under section 14 of the Act must be resorted to.

There were disputes between the parties regarding certain contracts which they entered into for sale by the plaintiff-respondent and for purchase by the defendants-appellants of certain quantities of Japan camphor. The case of the respondent is that the appellants did not take delivery of the camphor contracted for, that subsequently he sold the camphor and sustained loss which the appellants would not pay, that the disputes between the parties were referred to the arbitration of the Madras Kirana Merchants Association in accordance with a clause contained in the contracts to that effect and that an award was passed by the arbitrators. The suit is for recovery of the sum adjudged by the arbitrators by the award. The defence is that the respondent is confined to the remedy under the Indian Arbitration Act of 1940, which, it is the common case of both the parties, applies to this case. The lower Court held that a separate suit lies and granted a decree. The defendants appeal, and the only point for decision is whether a separate suit lies to recover a sum of money adjudged by the award in favour of a party to the arbitration.

It is undoubted that before the Indian Arbitration Act (X of 1940), where there was an arbitration and an award, two remedies were open to the successful party. One was to have the award filed into Court under the Indian Arbitration Act of 1899 or under Schedule II of the Code of Civil Procedure and to have it made a rule of Court. The other was to file a suit for the recovery of the sum adjudged or of the property given by the award. It is equally clear that in a suit filed by the successful party, the defendants had before this Act a right of challenging the validity of the award, on the ground that all the arbitrators did not act together or on other grounds open to them. The respondent's learned advocate while claiming a right of separate suit to a successful party, maintains that the remedy of the unsuccessful party is only to proceed under the Act if he wishes to challenge the validity of the award. He also contends that in a suit by the successful party for getting the relief which is given under the award the defendant cannot even raise the question of the validity of the award and that he must submit to a decree without any defence. Thus stated the position is rather anamolous, but if the law says so, the respondent's contention must be upheld. But before the Court arrives at this rather anamolous result, the provisions of the Act must be closely scrutinised. Under Section 14 of the Act where the arbitrators

* C. C. C. Appeal No. 77 of 1944. 28th March, 1945.

have made an award, they are to sign it and give notice in writing to the parties of the making and signing of the award. Clause 2 provides :

"the arbitrators shall . . . at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court . . . cause the award or a signed copy of it . . . . to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award."

Section 15 and 16 provide that the Court may modify or correct an award in certain cases or remit the award on any matters referred to arbitration for reconsideration. Section 17 provides that where the Court sees no cause to remit the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced, a decree shall follow. Section 31, clause (1) of the Act provides that an award shall be put into Court having jurisdiction in the matter to which the reference relates. Clause (2) of section 31 is important and it may be set out in full—

"Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of the award . . . . . shall be decided by the Court in which the award under the agreement has been, or may be, filed and by no other Court."

Section 32 provides that notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award and that no arbitration agreement or award can be modified, or amended otherwise than as provided in the Act. Section 33 says that—

"Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits."

But the Court may direct further evidence, as it may do in a suit. These are the provisions which are relevant for the decision of the question at issue. I am inclined to accept the argument of the respondent's counsel that if a person who is unsuccessful wishes to question the existence, validity or effect of the award, he is bound to do so only by resort to sections 32 and 33 of the Act. Section 33 expressly provides that a person who desires to question the validity or existence of the award shall apply to the Court and that the Court shall decide the question. Section 32 says that no suit shall lie for a decision upon the existence, effect or validity of an award and it also says that no award shall be set aside, modified or amended or in any way affected otherwise than provided in the Act. It is clear therefore that a person who wants to challenge even the existence of an award must do so by resort to an application under section 33. This view receives additional support from the provisions of section 31, clause (2) which says that—

"all questions regarding the validity, effect or *existence* of an award . . . . shall be decided by the Court in which the award has been or *may be filed* and by no other Court." (The italics are mine).

That being so, the question is whether the successful party is bound to have the award filed in Court under section 14 and to get a decree under section 17 of the Act. Where a successful party files a suit to obtain the relief that is granted to him by the award, it cannot be gainsaid that the plaintiff must prove the fact of the award, *i.e.*, its existence, before he can get relief. When the other side questions the existence or validity or effect of the award, a question regarding the existence, validity or effect of the award is directly raised. If an award is alleged by the plaintiff, obviously the defendant must be allowed to raise the question of the existence of the award. But under section 31, clause (2) even the existence of the award shall not be determined by any Court except the Court in which the award may be filed. This provision indicates that even a successful party to whom a relief is given under the award must seek to enforce it in the Court in which the award may be filed, that is, by proceeding under section 14 of the Act.

Decisions before the Act are obviously of no help. The only help that we have on this subject is the decision of Pollock, J., in *Nanhalal Anandilal* v. *Singhai Gulabchand*[1]. The learned Judge held that a successful party may file a suit

1. I.L.R. (1944) Nag. 340.

without resort to proceedings under the Act. That is no doubt a direct decision in favour of the respondent. But the judgment is very short and the learned Judge does not advert to section 31, clause (2). First he refers to the fact that it was open to a person interested in an award to sue for the enforcement of the award before the Act. Then he dealt with the argument put before him that section 32 of the Arbitration Act took away the right. He dealt with that question and pointed out that as indicated by the marginal note to that section, the section applies only to the case of a person who desired to challenge the validity of the award and not to a case where a person wanted to enforce the award.

It is urged that the wording of section 32 is wide enough to cover a case of a successful party seeking the reliefs granted by the award and that the marginal note ought not to be allowed to control the effect of the plain wording of the section. It is unnecessary to go into this question because, in my view, section 31, clause (2) contains a clear indication that even a successful party has no right of a separate suit.

In *Deoki Nandan Dalmia* v. *Basantlal Ghanshyamdas*[1], a party to a contract containing an arbitration clause filed a suit for a declaration that the contracts were wagering contracts and therefore illegal. The suit was filed after a reference was made by the other party to the Bengal Chamber of Commerce, the arbitrators named in the contracts. The real object of the suit was to restrain the defendant from proceeding with the arbitration before the Bengal Chamber of Commerce. Lort Williams, J., held that after Act X of 1940, the suit does not lie and that the only remedy is an application under the Act. After setting out sections 32 and 33 of the Act, the learned Judge said this :

> " The prosecution of the claims of the plaintiff will undoubtedly affect the arbitration agreement and a decision in his favour would result in a declaration that the agreement did not exist, or a decree setting it aside."

Referring to decisions before the Act, the learned Judge said :

> " That act was intended to and did alter the law and one of the main objects of the Act was to provide that claims to set aside arbitration awards or challenge arbitration agreements should be made by applications to Court."

This was a decision dealing with the right of a party who wanted to get round the arbitration agreement. The ground of decision is that though in form it was a suit to declare the contract illegal on the ground of its being a wagering contract, the declaration if given, would affect the validity of the arbitration agreement and that this question can be decided only in a proceeding under the Act. Similarly if a party to whom some reliefs are given by the award seeks to enforce them as a plaintiff and the defendant says that the award does not exist or that it is not valid or that the effect of the award is not what the plaintiff claims to be in his plaint, that question cannot be gone into by any Court other than " the Court " indicated by the Act.

The decree of the lower Court is reversed and the suit is dismissed with costs here and in the lower Court.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

The Chettinad Mercantile Bank, Ltd., by its Agent and Secretary T. Subramania Ayyar .. *Appellant**

v.

PL. A. Pichammai Achi and another .. *Respondents.*

Banker and customer—Trust money—Draft intended for one party taken in name of another—Beneficiary notifying claim to bank before encashment—Suit for declaration of right to money—Right of bank to set off—Claim for recovery of money whether necessary.

---

1. (1941) 2 Cal. 123.

* S. A. No. 637 of 1944. 21st February, 1945.

The plaintiff-respondent endorsed a cheque drawn in her favour to the first defendant. Her case was that she instructed the first defendant to pay the appellant-second defendant Bank on her behalf a certain amount, that he should take a certain sum as a loan and execute a promissory note in her favour for the same, that a certain amount should be paid to her in cash and that a draft for a certain amount should be obtained from the appellant Bank in the name of the respondent payable at Madras. The first defendant cashed the cheque in the appellant Bank and carried out all the instructions of the plaintiff-respondent except that of getting a draft in her favour. He in fact obtained a draft in his own name for the amount payable to plaintiff but the draft was not endorsed to her and being unable to realise the amount she gave notice and instituted a suit against the appellant Bank for a declaration that she was entitled to the beneficial interest in the draft. It was contended on behalf of the Bank that the first defendant owed a large amount to them and that they were entitled to set off the sum represented by the draft against the sums due by him.

Held, that under the circumstances the first defendant became a trustee for the plaintiff, that by obtaining the draft in his own name he committed a breach of trust, and that the plaintiff was entitled to the declaration asked for.

Held further, that the plaintiff was entitled to claim the declaration only and that she was not bound to include a prayer for recovery of the money in the same suit.

Appeal against the decree of the District Court of Ramnad at Madura, dated 26th August, 1943, and passed in A. S. No. 317 of 1942, preferred against the decree of the Court of the Subordinate Judge of Devakotta in O. S. No. 50 of 1940.

K. Bashyam and *A. V. Viswanatha Sastri* for Appellant.

R. Gopalaswami Aiyangar and *K. C. Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant in the suit appeals against the decree of the District Judge of Ramnad making it liable to pay a sum of Rs. 4,000 and interest thereon to the plaintiff. The plaintiff-respondent had two cheques given to her by the Harvey Mills, Madura, both drawn on the Imperial Bank, one for Rs. 20,000 and another for Rs. 18,682-8-0. The plaintiff endorsed both these cheques in favour of the first defendant. We are not concerned with the cheque for Rs. 20,000. As regards the cheque for Rs. 18,682-8-0, the plaintiff's case is that she gave definite instructions that the first defendant should pay a sum of Rs. 5,000 odd due to the second defendant Bank by the plaintiff in respect of some pledge of jewels made on her behalf by the first defendant, that he should take Rs. 3,000 as a loan and execute a promissory note for that sum to the plaintiff, that a draft for Rs. 3,000 should be taken in the plaintiff's name payable on the Kulitalai Bank to be utilised for her own purposes, that Rs. 3,000 odd should be paid to the plaintiff in cash and lastly that a draft for Rs. 4,000 should be obtained from the appellant Bank in the name of the plaintiff payable in Madras. The first defendant cashed the cheque in the appellant Bank on the 10th August, 1937. Of the directions given by the plaintiff to the first defendant, all but the last were duly fulfilled. The sum due to the appellant Bank was paid and the jewels redeemed. A sum of Rs. 3,000 was taken by the first defendant and a promissory note executed for that amount. A draft for Rs. 3,000 odd was obtained in plaintiff's name payable on Kulitalai Bank and Rs. 3,000 odd was obtained and paid in cash to the plaintiff. But the direction that a draft for Rs. 4,000 payable at Madras should be obtained in the name of the plaintiff was not complied with. The first defendant admittedly got a draft for Rs. 4,000 payable at Madras but it was obtained in his own name. The plaintiff alleges that when the defendant paid her Rs. 3,000 in cash and returned her jewels he gave also the draft for Rs. 4 000, that being illiterate she did not then know that it had been taken in the name of the first defendant, that later on when she attempted to present it and get the money on it, she discovered that it had been taken in the name of the first defendant, that she thereafter made demands on the first defendant to endorse it over to her and that he refused to do so. The plaintiff then gave notice of her claim to the appellant Bank, which however gave no reply. Thereupon the present suit was filed for a declaration that the plaintiff was entitled to the beneficial interest in the draft and for such other relief as the Court may think fit.

Various defences were raised by the appellant who is the second defendant in the suit. The main defence is that the first defendant owes large sums of money to the appellant Bank and that the appellant is entitled to adjust the sum represented

by the draft against the sums due by the first defendant. This claim was presented in the arguments before me as either one of banker's lien or a right of set off. The trial Court dismissed the suit but on appeal the District Judge of Ramnad granted a decree against the appellant. Elaborate arguments have been addressed to me by the learned advocates on the question of when the banker's lien and right of set off come into existence and how they can be exercised.

It would appear that the first defendant became indebted to the appellant Bank in respect of four hundis dated the 29th December, 1938. The total value of these hundies was Rs. 5,000. The amount was not paid and a suit O. S. No. 69 of 1940 on the file of the Subordinate Judge's Court of Ramnad was filed in 1939 by the appellant Bank against the first defendant for recovery of Rs. 5,180-7-6. This is the principal and interest due in respect of these hundies. Before that the plaintiff had issued the notice Ex. P-2 stating that the first defendant had obtained a draft on the 10th August, 1937, for Rs. 4,000 in his own name, that the amounts represented by the said draft belonged to her and not to the first defendant and that the Bank should not pay the amount to the first defendant. In the appellant's suit against the first defendant just referred to, the first defendant applied for leave to defend as the suit was under the summary chapter. In the affidavit filed in support of that application, the first defendant said that the sum of Rs. 4,000 represented by the draft now in question should be adjusted as against the amount claimed in the suit. The appellant, who was the plaintiff in the suit, filed a counter-affidavit resisting the first defendant's claim that the amount represented by the draft should be adjusted and claimed a decree for the full amount. Though leave to defend was given and a written statement was filed once again claiming that the amount of the draft in question should be set off, the Court held that it could not be done and granted a decree for the full amount of the suit. The chief reason put forward by the appellant in justification of its refusal to adjust the amount was that the first defendant had stated that the draft had been lost, that the Bank was afraid that later on some one might turn up with a valid claim to be paid the amount of the draft and that until the draft was produced or security given for the amount, the adjustment or set off could not be consented to by the appellant Bank. This was a very proper position to take and a decree for the full amount was passed in that suit.

On these facts is the plaintiff entitled to demand that the appellant Bank should pay her the amount of the draft? It may be mentioned that the draft was drawn on the appellant's branch at Madras. But this would not make any difference because even if the Bank had given a draft on another banking institution, payment of the draft could be countermanded in which case the amount represented by the draft can be claimed only from the appellant Bank. If the appellant Bank has a lien for the other amounts due to it by the first defendant or if the Bank can set off the amount of the draft against the indebtedness of the first defendant, the plaintiff must fail. At one stage it appeared as though the question could be disposed of shortly on the ground that the indebtedness of the first defendant in respect of which the lien or set-off was claimed arose subsequent to the receipt by the Bank of the plaintiff's notice, Ex. P-2 dated the 31st October, 1938. The plaint in O. S. No. 69 of 1940, as stated above, ended in a decree for over Rs. 5,000 and that is the amount in respect of which the lien or set-off is claimed. It appears from Ex. P-4 (*c*) that the suit was in respect of four hundis all dated the 29th December, 1938. If these hundis were all fresh transactions it is clear that with notice of the plaintiff's claim to the draft in question, the Bank advanced fresh monies to the first defendant. In that case, the question would be easy to answer and the case of the appellant would stand on a very slender basis. If with notice of an adverse claim to the draft in question, the appellant Bank went on advancing fresh amounts to the first defendant it would be doing so with its eyes wide open and cannot complain if it turned out that the amount due under the draft really belonged to the plaintiff. With a view to clarify the position, I directed the appellant to produce its accounts. That was done and Mr. Gopalaswami Ayyangar, learned counsel for the respondent, went through them and stated quite fairly that all these hundis were really renewals

of earlier hundis. On this statement it was unnecessary to have the accounts formally exhibited. There is one statement made by Mr. Gopalaswami Ayyangar which I must here record that even the accounts produced do not show that the first defendant was indebted to the appellant Bank on the 10th August, 1937.

The case as presented before me is one of either lien or of set-off. Banker's lien can properly be said to arise only in respect of any securities held by the Bank. If the customer deposits certain securities and ultimately there is a sum due to the Bank, the Bank has a lien over these securities and it could hold them against the amount due by the customer. Strictly speaking, the present case is not one of lien. The Bank has no securities of the first defendant over which it seeks to exercise this right of lien. The only question that arises is whether the appellant has a right of set off. The subject of Banker's lien is dealt with in Hart's Law of Banking, 4th Edn., Vol. II Chapter 6, page 843 onwards. The learned author begins the discussion of the subject thus :

> " Banker's lien is the right of retaining things delivered into his possession as a banker if and so long as the customer to whom they belonged or who had the power of disposing of them when so delivered is indebted to the banker on the balance of the account between them provided the circumstances in which the banker obtained possession do not imply that he has agreed that this right shall be excluded."

It will be found that in all the cases where the question of banker's lien came up there were securities or other properties of the customer in the hands of the bank and the bank sought to exercise the right of retaining those securities or documents until the whole amount due to it was paid. When and under what circumstances the lien is excluded is dealt with in the same chapter. I agree with Mr. Gopalaswami Aiyangar's argument that in this case we are not concerned with the question of lien at all. I do not therefore propose to enter into a discussion of the various authorities cited by Mr. Bashyam, learned Counsel for the appellant, on the question of lien. I confine myself to the question whether the bank has a right of set-off. Here a draft was given in the name of the first defendant and delivered to him on the 10th August, 1937. The draft is now produced by the plaintiff and she claims that she is entitled to the beneficial interest in the amount represented by the draft. It is admitted by the appellant bank that even at the time of the suit the bank had not actually adjusted the amount of this draft against the first defendant's account, *i.e.*, against the first defendant's indebtedness to itself. But Mr. Bashyam says that his client has the right of setting off the amount of the draft against the indebtedness of the first defendant and that his client can exercise it even in the course of the suit.

In the case of money of the customer paid into the bank into his current account or deposit account, the amount ceases to be the property of the customer and becomes the property of the banker and he is thereafter under a contractual obligation to repay or give credit to the customer for the amount. In such a case, there is no property of the customer of which the banker has possession, the possession of the banker co-existing with his own ownership of the money. Accordingly, the essential conditions necessary to the existence of the lien are lacking. Moreover the purpose of the lien which exists over the property of the customer is in this case attained by the application of the principle of set-off whereby the banker can take into account any item in his own favour as against any payment in by his customer before arriving at the balance subsisting between them. In the present case if the bank had not issued a draft for the sum of Rs. 4,000 and there was a sum of Rs. 4000 to the credit of the first defendant in some account and the first defendant later on became indebted to the bank in respect of the bills drawn by him, the bank would clearly be at liberty to set off the amount in question against the amount due on the bills.

In a case of this kind, the question is when does the right to set off arise and if by the time when the bank seeks to set off the sum due by it to the customer against the sums due by the customer to it, it gets notice of an adverse claim, is the right to set off lost ? On the facts stated when the plaintiff sent her notice on the 31st October, 1938, the bank owed the sum of Rs. 4,000 represented by the draft to the first defendant and the first defendant owed about Rs. 5,000 on the bills which were later on renewed in December that year. The appellant's argument is that

before the bank got notice, the bank had the right to set off and that the right of set off is not lost merely because by the time it is sought to be exercised, the bank got notice of the plaintiff's claim. The respondent's argument is that in this case the bank issued a draft to the first defendant who was thus put in a position to enable third parties to acquire a title to the money represented by the draft and that his client's right must therefore prevail. It is conceded that if the draft had been assigned over to the plaintiff even after the first defendant became indebted to the appellant under the bills, the plaintiff would have become entitled to claim the amount in question from the appellant. The respondent's learned counsel argues that if this is the true position, the plaintiff became beneficially entitled to the amount of the draft though it was obtained in the name of the first defendant and that at any rate after the draft had been handed over to her, the plaintiff could claim the amount in question from the bank. On the findings of the lower appellate Court, the plaintiff had given definite instructions to the first defendant to obtain the draft for Rs. 4,000 in her own name on a Madras Bank. The first defendant obtained the draft but did not get it in the name of the plaintiff. That was a clear breach of duty on the part of the first defendant who stood in a fiduciary relationship to the plaintiff. The argument is that in such a case the beneficial interest in the draft passed to the plaintiff and that there is no reason why the result should not be the same as in the case of an actual assignment made by the first defendant to a third party. It is urged that one is an assignment by act of parties, that the other is an assignment by operation of law, that in either case a third party gets a right to the amount represented by the draft and that the bank which enabled the first defendant to create rights in third parties must suffer and cannot claim the set off.

Strong reliance is placed by Mr. Bashyam for the appellant on two decisions. One is the decision of the Privy Council in *Union Bank of Australia* v. *Murray Aynsley*[1] Murray Aynsley was one of the trustees under an ante-nuptial settlement executed by Mr. and Mrs. Harris. A sum of £ 1,800 was held by the trustees under this ante-nuptial settlement for the benefit of Mr. and Mrs. Harris. There was a firm of Miles & Co., which was carrying on business and which had a banking account with the Union Bank of Australia, Ltd. This sum of £ 1,800 was invested through the agency of Miles and Co., on two loans one of £ 1,600 to L. V. Lodge and the other of £ 200 to one Kemp. These amounts were repaid by the debtors in October, November and December 1894. By that time Miles and Co., had transferred their business to a joint stock company of the name of Miles and Co., Ltd. The moneys were realised by Miles & Co., Ltd., on behalf of Murray Aynsley and as when they were received, the amounts were paid into the appellant bank to the credit of No. 3 account. Miles and Co., and their successors Miles & Co., Ltd., were the customers of the appellant bank. For their convenience the bank kept two accounts one which was known as the general account and the other which was known as the stock account of the concern. Later at the request of the managing partner of Miles & Co., a third account known as No. 3 account was opened for the firm. It was into this third account, that the amounts in question were paid by Miles and Co., Ltd., who continued to keep the third account just mentioned. The sums remained with the bank of Australia until Miles & Co , Ltd., failed. At that time the bank had to get large sums of money from Miles & Co., Ltd. The question was whether the bank was entitled to set off the amount remaining to the credit of Miles & Co., Ltd. in account No. 3 against the amounts due to the bank under accounts Nos. 1 and 2. The Judicial Committee held that it was entitled to do so. It was pointed out that at the time when account No. 3 was opened or when monies were paid into that account from time to time, the bank had no notice that the account related to trust funds or that monies paid into that account were trust funds. The bank was therefore entitled to set off the amounts in No. III account towards the sums due to it under the two other accounts.

Mr. Bashyam urges that in that case the Bank had at the time when it claimed the right of set-off, notice that the amounts paid into No. III account were trust monies and that nevertheless the Judicial Committee held in favour of the Bank's

1. (1898) A.C. 693.

right to set off. The crucial point of time, knowledge at which time, would deprive the Bank of the right of set off would appear to be the time when the account was opened or when the monies were paid into that account.

The other decision relied on is *Thompson* v. *Clydesdale Bank, Ltd.*[1], where a stock broker was given some shares by the appellant with instructions to sell them and to invest the sale proceeds in certain Colonial Banks in the appellant's name. The stock broker sold the shares through another stock broker and from the sum so realised he repaid to the respondent bank the sum due by him on an overdrawn account. This he did by means of a cheque. The respondents knew that the cheque represented the proceeds of the sale of shares but was not aware whether the money paid was in the broker's hands as agent or otherwise. The appellant claimed the amount from the respondent bank on the ground that the agent's act in paying the appellant's money contrary to directions was a breach of trust and that the respondent bank which knew that the cheque represented the sale proceeds of the appellant's shares was liable to repay the sum. The House of Lords held that the Bank was not liable to repay that amount. It was pointed out that the mere fact that a certain sum was the realisations of the sale of shares of a customer of the broker did not mean in all cases that the broker was not entitled to use it for himself. The Lord Chancellor dealt with this aspect at page 288 and said this :

"The only point to which I have not alluded, and upon which stress was laid, is this ; that in the bank books Mr. Thompson is described as a stockbroker ; therefore, it was said, his account would be understood to be one relating to matters in which he was acting for principals, and that this, coupled with the answers to which I have alluded, is sufficient to establish the appellant's case. My Lords, if a stockbroker who was receiving money in respect of transactions for his clients could never properly pay it to his account in discharge of liabilities incurred, there might be something in the case of the appellants ; but obviously that is not so. A stockbroker may make advances to his clients in anticipation of sums which be will receive for them. In that case it is perfectly legitimate, he having obtained for that purpose an advance from his bankers, that when he receives the money for his clients he should pay it to his bankers for the purpose of reinstating the account he has overdrawn. Therefore it is clear that there may well be cases in which a stockbroker having overdrawn his account may properly pay money which he has received for his clients into that account. It is obvious that the case of the appellants wholly fails unless they bring home to the respondents much more than has been attempted here, namely, a knowledge that in the particular case the person was not justified in paying over the particular amount. Of course, if they prove that there was such knowledge on the part of the bankers, the bankers could not retain it. It seems to me that if, because an account is opened with bankers by a stockbroker, they are bound to inquire into the source from which he receives any money which he pays in it would be wholly impossible that business could be carried on, and I know of no principle or authority which establishes such a proposition. I confess therefore, with all respect for the learned Judge who took a different view in the Court below, that it seems to me to be a very clear case."

Thus if the broker paid monies of the customer to discharge his own indebtedness to a bank, that by itself is not enough to render the bank liable to repay the amount to the customer. It is a breach of trust as between the broker and his customer. But before the Bank can be charged with any liability it must be proved that the Bank had knowledge of the fact that the broker was paying the money contrary to the customer's instructions or that it had knowledge of facts which would put the Bank on enquiry.

In the present case, if the first defendant was indebted to the Bank on 10th August, 1937, when he paid in the cheque for Rs. 18,000 odd and the Bank had retained the sum of Rs. 4,000 without issuing a bank draft, then the bank would have been under no liability to the plaintiff. But the whole difficulty has arisen from the fact that the bank issued the draft and thereby brought about a position where third parties could claim rights in the draft.

The decisions relied upon by the respondent may now be considered. I shall first deal with the case of *John* v. *Dodwell & Co.*[2] One Williams was managing their (respondent's) business at Colombo. He was authorised to draw cheques upon their banking account for the purpose of the business which he was managing on their behalf. The appellants before the Judicial Committee were brokers and purchased shares for Williams. In payment of the amounts due for these shares, Williams tendered

1. (1893) A.C. 282. 2. (1918) A.C. 563.

cheques drawn on the respondents' account in a certain Bank. The cheques themselves indicated that the fund on which the cheques were drawn belonged to respondents Dodwell & Co. These were accepted by John & Co., and they cashed the cheques and paid it to the sellers of the shares. The respondents thereafter filed the suit which went up before the Judicial Committee for recovery of the amount. Their case was this. The amount in the bank on which the cheques were drawn belonged to them. Williams was drawing cheques on that amount. Williams would have authority to draw cheques on the amount belonging to the respondents only if he drew them for the purpose of the business which he was managing. That was the limited authority given to him to operate on the banking account of the respondents. Therefore, the act of Williams in drawing a cheque for paying his own dues was not authorised. The clerks of John & Co. knew when they saw the cheques given by Williams that they were drawn upon the account of the respondents. Therefore they had knowledge that Williams was drawing upon the account of another person. On these facts, the Judicial Committee held that though the appellant John & Co., took the cheques in good faith and paid the same to the customers, they were liable in as much as they took the money in respect of which Williams was committing a breach of trust with the knowledge got by the clerks of the appellant company that he was drawing upon the account of another person. They say this at page 568:

"However, it is nonetheless clear that, innocent of fraud as the appellants were found to be, they, by the action of their clerks, took an unmistakable and grave risk in the transactions in question. On the face of these, Williams was, without showing authority to do so, drawing cheques for his own purposes on the respondents' funds at their bankers. If it turned out that the respondents had not allowed him to do so, and would not ratify his action, the notice which the appellants had got through the agency of their clerks of what was *prima facie* a breach of duty on his part would deprive them of all title to hold the cheques as against the respondents, if the latter should challenge the transaction. For when an agent is entrusted by his principal with property to be applied for the purpose of the latter and to be accounted for on that footing he is, by virtue of doctrines which apply under the law of Ceylon, as they do under the law of this and other countries, in a fiduciary position, and any third person taking from the agent a transfer of the property with knowledge of a breach of duty committed by him in making the transfer holds what has been transferred to him under a transmitted fiduciary obligation to account for it to the principal. That there is no privity of contract between him and the principal does not make any difference, for the title does not rest on contract. The property belongs to the latter in the contemplation of Courts which administer equity, whether in the form in which the Court of Chancery in this country applied to trusts or in the form which later developments of the Roman law have recognized."

This decision helps the respondent only to this extent that the first defendant who got definite instructions to get a draft in the plaintiff's name was in a fiduciary position to the plaintiff and in taking the draft in his own name he was committing a breach of his duty and therefore a breach of trust. But this case does not help the respondent further. The appellant had no knowledge of the instructions given by the plaintiff to the first defendant.

I shall then deal with the decision of the Judicial Committee in *O. RM. O. M. SP. Firm* v. *Nagappa Chettiar*[1]. The plaintiff Nagappa Chettiar gave a sum of money to his uncle Subramania with a view that the moneys might be utilised for conducting a charity. It was not paid in cash but in the shape of two hundis. It would appear that the plaintiff Nagappa had an account with a particular bank and the hundis were drawn on that bank, *i.e.*, the plaintiff directed the bank to pay sums represented by the hundi to Subramania. The hundis were drawn in the name of charity. They were taken by Subramania to the appellant bank and on the 11th September, 1917, the bank endorsed each with a statement that the amount with interest up to date had been received. The bank credited the sums in each case to an account in the name of the charity concerned though Subramania had separate account of his own in the appellant bank, long prior to 11th September, 1917, when the account was opened in the name of the charity. The moneys remained to the credit of the charities till the 10th February, 1920, when the sum amounted to Rs. 15,700 odd. On that day Subramania owed the bank in his private account a sum of Rs. 15,700. On the 10th February, 1920, out of the amount standing to the credit of the charities, Rs. 15,700 was taken over to the

1. (1941) 1 M.L.J. 393 : L.R. 67 I.A. 448 : I.L.R. (1941) Mad. 175 (P.C.).

other account and that account closed. The balance of Rs. 32-15-9 was paid in cash to Subramania and the charity account closed. The plaintiff filed the suit which went up to the Judicial Committee for recovering the amount from the bank. On these facts it is clear that the bank knew that the sum entered in the charity accounts in its own books was really the charity money and not the amount at the disposal of Subramania. Subramania was indebted to the extent of Rs. 15,700 on the 10th February, 1920, and what the bank did was to appropriate an amount which it knew was the trust money to the private account of Subramania. On these facts it is clear that the appellant bank which, right from the very beginning, knew that the amount was the trust amount aided Subramania to commit a breach of trust by applying trust money to discharge his own individual indebtedness. Such a thing was not permitted. Though this case was very strongly relied upon by Mr. Gopalaswami Aiyangar in support of his proposition that if at the time when the adjustment was made the bank knew that the money was trust money it had no right of set-off, it really seems to be a case where the bank knew right from the very beginning that the amount was one belonging to the trust. In fact when the hundis were paid in September 1917 the bank credited them in the name of the charity. If the facts had been that there was one account in Subramania's name in which these amounts were credited and another account in which Subramania had overdrawn and after Subramania became indebted in his No. 2 account to the extent of Rs. 15,700 the bank came to know that the amount in the first account was trust money, then the case would have been of help or if in the case before us, the indebtedness of the first defendant had arisen after the plaintiff's notice of October 1938 then the decision of the Judicial Committee would have been of great help. Unfortunately, here we have to take it that there are two accounts one represented by the Rs. 4,000 which is the amount of the draft, another account the bills or hundis account. Long prior to October 1938 the first defendant had drawn hundis and had become indebted. In the No. 1 account or the draft account he was a creditor of the bank. If according to the law, the customer had two accounts in a bank, being in one account a debtor and in the other a creditor, the bank can adjust the one against the other; and it had that right on the day when it honoured certain bills of the first defendant and so allowed the first defendant to become a debtor. The principle is that a bank relies upon the general credit of the customer taking all the accounts as one when it advances money or honours bills drawn by the customer on itself. The right of set off must be held to arise on that day. If this is so, the appellant bank would have had the right of looking to the draft account on the day when it honoured the bills of the first defendant. This case does not seem to be of much assistance.

The last case is *Imperial Bank of Canada* v. *Mary Victoria Begley*[1]. In that case the respondent Mary Victoria Begley had an account with the Imperial Bank of Canada., She executed a power of attorney in favour of *M* authorising him to attend to the investment of her moneys. *M* was already indebted to the bank on his own private account and purporting to act under the power of attorney he transferred from the respondent's account to his own account a sufficient sum to discharge his indebtedness to the bank. The object of the power of attorney was to make arrangements for the investment of the respondent's money at a higher rate of interest than the ordinary bank rate. The appellant bank had thus allowed *M* to operate upon the respondent's account with it and so discharge *M's* indebtedness to it. The officers of the bank made no attempt whatever to verify from the respondent herself whether *M* was authorised to act in the way he acted. The Judicial Committee held that the Act of *M* in transferring the amount which stood to the respondent's credit in the bank to his own overdrawn account with the bank was clearly a breach of trust as it was contrary to the directions given by the respondent, namely, an investment at a higher rate of interest. He himself was an impecunious person and his executing a promissory note to the respondent which he did was really a mere camouflage and could not be taken as a fulfilment of the trust reposed in him. Investment means a good investment and not lending to an impecunious

1. (1936) 44 L.W. 128 (P.C.).

person and particularly when it is lent to the agent himself who was possessed of no means. The next question was whether the bank was affected by this breach of trust on the part of the agent. On this part of the case the facts found were that the bank knew that *M* was of impecunious character and that he was drawing upon an account of another person under a power of attorney. Therefore it was held by the Courts of Canada with which the Judicial Committee agreed, *viz.*, that these facts put the bank on enquiry and their action in transferring the amounts in the respondent's account with it in payment of *M's* indebtedness to it without making the slightest reference to the respondent who was also their customer made the bank a constructive trustee of the sum. This decision would be relevant if at the time when the Rs. 18,000 cheque was paid in, the bank had notice of any fact which would have put them on enquiry regarding the plaintiff's rights.

The case before me can, I think, be disposed of on the ground that the appellant by giving the draft in question to the first defendant enabled third parties to acquire rights in it and that it is not shown that the right of set off claimed by the bank arose before the third parties acquired rights in the draft. If the first defendant endorsed the draft to another, it is not contended by Mr. Bashyam that the bank would not be liable to the third party. That is the very reason why the bank would not agree to the set off when in the previous suit the first defendant claimed the set off. Even if the first defendant, had, after he became indebted to the bank on the bills in question, assigned the draft to a third party, the appellant would be bound to pay the amount to the assignee. An assignment may well take the form of creating a trust in respect of the amount covered by the draft. If the first defendant created a valid trust, the trustee would, like an assignee or an endorsee be entitled to the amount covered by the draft. The same result should, I think, follow where a trust is created by the operation of law. On the facts found by the lower Court, the first defendant became a trustee for the plaintiff. When he obtained the draft in his own name, he committed a breach of trust and the law says that the property obtained by the first defendant under those circumstances must be held by him for the benefit of the plaintiff, *i.e.* a trust was created in favour of the plaintiff in respect of the amount of the draft. This is certainly analogous to the case of an assignment. If in the case of an assignment for value, the assignee would be entitled to get the amount from the appellant bank, it seems to me, the answer must be the same in the case of the plaintiff who seeks to recover the amount as the beneficiary under the trust created by law in her favour. She had already paid for the draft.

The next point urged is that the suit is not maintainable without a prayer for recovery of the amount. It is very doubtful whether a suit would lie for recovery of the amount without getting a declaration of the plaintiff's right to the amount covered by the draft. As held by this Court in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[1] a suit does not lie on a negotiable instrument by any person other than the person named as the payee or the person to whom he has endorsed it over. There is therefore no substance in the argument that the suit should have included a prayer for the recovery of the amount. The question is not whether she might not have included that prayer also but whether she ought to have done so in this case. I hold that she need not include a prayer for recovery of the money in this suit and the suit as filed is maintainable.

It is next contended that the suit merely to declare a pecuniary right of a plaintiff arising out of a contract does not lie. This again does not apply to a case like this where it is necessary to have the right of a claimant to the amount represented by a negotiable instrument declared before a suit could be filed for recovery of the amount due on the negotiable instrument.

In the result, the second appeal fails and is dismissed with costs of the first respondent.

No leave.

B.V.V. —— *Appeal dismissed.*

---

2. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay).

PRESENT :—LORD MACMILLAN, LORD GODDARD AND SIR MADHAVAN NAIR.

Parashram Detaram Shamdasani .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Contempt of Court—Party appearing in person—Reference in the heat of argument suggesting that members of Bar are in the habit of misleading the Court—If " contempt " calling for action—Remark about taxing masters questioning if what is written as considered in their order is considered at all—If amounts to contempt—Contempt proceedings—Different from ordinary criminal proceedings—Power to order costs against the Crown unsuccessfully endeavouring to uphold an order committing the appellant for contempt.

The appellant appearing in person, when the counsel for the opposite party suggested that he was misleading the Court and that he should read out a paragraph in the plaint, said : "I don't keep anything back at all. My fault is that I disclose everything unlike members of the Bar, who are in the habit of not doing so and misleading the Court." Further in dealing with the Taxing Master's statement, with regard to the allowance of discretionary items that he had taken into consideration all the matters mentioned in the rule, the appellant said : "It is customary for the Taxing Masters to write what is written at the end of the paragraph, but is it considered at all ?" The Judge before whom the case was proceeding found him guilty of contempt and sentenced him to a term of imprisonment and fine. On appeal to the Judicial Committee,

Held, the words used in respect of the Bar, did not and could not amount to a contempt of Court and there was no jurisdiction in the learned Judge to exercise his summary powers in respect of them. With regard to the words relating to the Taxing Masters they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of Court.

The summary power of punishing for contempt should be used sparingly and only in serious cases and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended.

Although the matter is one which is known as a criminal contempt, it is a different category from an ordinary criminal case and the practice of not awarding costs to the successful appellant against the Crown appearing and upholding a conviction in a criminal case is not applicable. Where the Executive on behalf of the Crown deemed it necessary not only to appear in the appeal but endeavoured to uphold the conviction for contempt, the successful appellant should have the costs of the appeal.

W. W. K. Page for Appellant.

J. Millard Tucker and *R. B. J. Mackebba* for Respondent.

Their Lordships' Judgment was delivered by

Lord Goddard.—This is an appeal from an order of the High Court of Bombay made by Kania, J., adjudging that the appellant was guilty of a contempt of Court, committing him to prison for three months, and ordering him to pay a fine of Rs. 1,000. On the day after the order was made the appellant applied to the learned Judge for a modification of the sentence expressing sincere and unreserved regret for having used the expressions which were held to be a contempt, and the sentence was then reduced to one of eight days' imprisonment but no alteration was made in the fine. The sentence of imprisonment was served and the appellant then applied to the High Court in its appellate criminal jurisdiction for a certificate that the case was one fit for appeal to His Majesty in Council under clause 41 of the Amended Letters Patent of 1865. This application was opposed by the Advocate-General, who submitted there was no jurisdiction to grant it as it was said that the clause in question did not apply to a committal for contempt of Court. The High Court (Beaumont, C.J., and Sen, J.) held that there was jurisdiction to grant a certificate and that it was a proper case in which to do so, and this was accepted as right by counsel for the respondent before this Board, and their Lordships accordingly do not think it necessary to express any opinion upon this matter.

The appellant had been an unsuccessful plaintiff in a suit in the High Court, and had been ordered to pay costs. They were taxed and the appellant then took out a summons to review the taxation and, though a layman appeared in person, to support his objections. In the course of the hearing counsel opposing stated the appellant was misleading the Court as to the nature of the issues raised in the action and insisted that he should read out a paragraph in the plaint. The appellant then said :

---

* 29th May, 1945.

"I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the Court."

This caused a protest from opposing counsel, Mr. Desai, whereupon the appellant immediately apologised and expressed his regret for having used an unfortunate expression in the heat of argument. Later in dealing with the Taxing Master's statement, with regard to the allowance of discretionary items, that he had taken into consideration all the matters mentioned in rule 563, the appellant said :

"It is customary for the Taxing Masters to write what is written at the end of the paragraph; but is it considered at all?"

No protest or observation on this statement was made either by Bench or Bar at the time when it was uttered, nor when judgment was given, and it appears to their Lordships that it must have been regarded as no more than the sort of tactless and intemperate statement that is not infrequently made in the heat of argument and not only, by litigants in person. On 13th October, 1942, the appellant concluded his argument and the Court proceeded to give judgment but had not finished doing so at the end of the day. At the rising of the Court, Mr. Desai stated that he would draw the attention of the Court to the statement made by the appellant with reference to the Bar and would apply that appropriate action be taken. On the next day both Mr. Desai and the Advocate-General of Bombay appeared, and, though the appellant again apologised and expressed regret for what he had said, moved the Court to punish the appellant for a contempt in using the language he did regarding the Bar. In the course of the argument the learned Judge himself then raised the question as to the words the appellant had used relating to the Taxing Masters. On the following day, the learned Judge delivered a lengthy judgment, reviewing some authorities, and, coming to the conclusion that the appellant had been guilty of a contempt both in his reflections on the Bar and on the Taxing Masters, made the order against which this appeal is brought.

Dealing first with the appellant's reference to the conduct of the Bar, their Lordships share the surprise expressed by the Chief Justice when granting the certificate for appeal as to what he described as the somewhat undue degree of sensitiveness displayed in taking so serious a view of what had been said. Their Lordships would indeed go further and say that it would have been more consonant with the dignity of the Bar to have ignored a foolish remark which has been made over and over again not only by the ignorant, but by people who ought to know better, and no doubt will continue to be made so long as there is a profession of advocacy. To treat such words as requring the exercise by the Court of its summary powers of punishment is not only to make a mountain out of a mole hill but to give a wholly undeserved advertisement to what had far better have been treated as unworthy of either answer or even notice. But apart from the question of whether the motion was wise or expedient it has to be decided whether these words could be properly regarded as a contempt of Court. The principle to be applied is clear enough. For words or action used in face of the Court, or in the course of proceedings, for they may be used outside the Court, to be a contempt, they must be such as would interfere or tend to interfere with the course of justice. No further definition can be attempted. It must be rare indeed for words used in the course of argument, however irrelevant, to amount to a contempt when they relate to an opponent, whether counsel or litigant. If in the course of a case a person persists in a line of conduct or use of language in spite of the ruling of the presiding Judge he may very properly be adjudged guilty of contempt of Court, but then the offence is the disregard of the ruling and setting the Court at defiance. So also if a litigant or an advocate threatened or attempted voilence of the opponent, or conceivably if he used language so outrageous and provocative as to be likely to lead to a brawl in Court, the offence could be said to have been committed. An insult to counsel or to the opposing litigant is very different from an insult to the Court itself or to members of a jury who form part of the tribunal. Their Lordships mention this matter because their attention was drawn to the case of Ex parte *Pater*[1] where a member of the Bar was

---

1. (1864) 5 B. and S. 299 : 122 E.R. 842.

adjudged guilty of contempt by the Middlesex Quarter Sessions and fined for insulting a juryman and persisting in his conduct when reproved by the Deputy Assistant Judge. The Court of Queen's Bench refused to interfere and would not grant a *certiorari* to quash the order saying that they could not act as a Court of Appeal from the Sessions. But it is quite clear that the Court's refusal was based on the fact that there was evidence of conduct which could amount to contempt, and the Court held itself free to inquire whether the inferior Court had reasonable grounds for adjudging that a contempt had been committed. Their Lordships think it unnecessary for them to deal with the cases of *R.* v. *Davision*[1] and *French* v. *French*[2], on which Kania, J., relied, as the judgment of Beaumont, C.J., has already shown that they do not support the propositions that the learned Judge thought they did, and the Board entirely agree with the Chief Justice. In their Lordships' opinion the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer to Mr. Desai in particular, did not and could not amount to a contempt of Court, and consequently there was no jurisdiction in the learned Judge to exercise his summary powers in respect of them.

With regard to the words relating to the Taxing Masters, no doubt if a litigant were to suggest in Court that its officers were corrupt or habitually failed to carry out their duties the Court might consider it a contempt, though if it were only the latter that was suggested it would be unwise to do so. But when all the circumstances here are considered, and especially that when the words were uttered there was no reproof or even comment from the Bench it is impossible to suppose that they were treated or indeed intended as more than a tactless way of suggesting that Taxing Masters were apt to deal somewhat summarily with such matters as were then in question. It was not till the Advocate-General was moving for punishment on the appellant in respect of the other words that any notice seems to have been taken of the matter and then by the Judge himself, somewhat late in the day as it seems to their Lordships. In their opinion they afford no reasonable grounds for adjudging the appellant guilty of so grave an offence as contempt of Court and on this point also their Lordships are glad to find that their opinion and that of the Chief Justice and Sen, J., coincide.

Their Lordships would once again emphasise what has often been said before that this summary power of punishing for contempt should be used sparingly and only in serious cases. It is a power which a Court must of necessity possess; its usefulness depends on the wisdom and restraint with which it is exercised, and to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. The Bar can surely maintain its dignity and prestige without having to invoke this jurisdiction.

Their Lordships will humbly advise His Majesty that this appeal should be allowed and the order of the learned Judge set aside. It should have been said that originally the Chief Justice and other Judges of the High Court were made respondents to this appeal. It was afterwards realised that this was incorrect and by an Order in Council dated the 27th October, 1944, the Crown was substituted as respondent. Where the Crown appears to uphold a conviction in a criminal case it is not the practice to award costs to the appellant in the event of the appeal succeeding. Although this matter is one which is known as a criminal contempt it obviously is in a different category from an ordinary criminal case. It is a matter of some surprise to their Lordships that in spite of the emphatic opinion of the Chief Justice and another Judge of the Court of which the appellant was alleged to be in contempt that no contempt had been committed the Executive should have deemed it necessary not only to appear but to have endeavoured to uphold this order. In these circumstances, their Lordships are of opinion that the appellant should have the costs of this appeal.

K.S. *Appeal allowed.*

---

1. (1821) 4 B. & Ald. 329: 106 E.R. 958. 2. 1 Hogan. 138.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ramabhakthula Ramayya .. *Appellant**

v.

Chittoor District Co-operative Deputy Registrar and Liquidator of Co-operative Societies and others .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), sections 47 and 49—Society in liquidation—Order against member—Execution sale—Suit in Civil Court to avoid—Maintainability.

The appellant was a member of a co-operative society which went into liquidation. He was indebted to the society and the liquidator having passed an order against him under section 47 of the Madras Co-operative Societies Act, applied to the Deputy Registrar of Co-operative Societies to execute the order requiring payment by bringing to sale properties belonging to the appellant. After the properties had been sold the appellant filed an application before the Deputy Registrar for an order setting aside the sale on the ground that there had been a material irregularity and fraud in connection with the proclamation and conduct of the sale. The application having been rejected the appellant appealed to the Registrar who confirmed the order of the Deputy Registrar. Thereupon the appellant filed a suit in the Civil Court for a decree declaring that the sale was fraudulent and that all the proceedings in execution were vitiated by material irregularity.

Held, that the jurisdiction of the Civil Court was ousted in such matters by the provisions of the Co-operative Societies Act and the rules made thereunder and that the suit was therefore not maintainable.

Appeal against the decree of the Court of the Subordinate Judge, Chittoor, in O. S. No. 54 of 1942.

K. Umamaheswaram and *A. Ramaswami* for Appellant.

C. S. Venkatachariar, D. Ramaswami Aiyangar, T. L. Venkatarama Aiyar and *K. Kottayya* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant was a member of the Valavali Agraharam Co-operative Society, which is now in liquidation. He was indebted to the Society and the liquidator passed an order against him under section 47 of the Madras Co-operative Societies Act, 1932. This entitled the liquidator to proceed in execution in accordance with the rules framed under the Act. The liquidator applied to the Deputy Registrar of Co-operative Societies to execute the order requiring payment by bringing to sale properties belonging to the appellant. After the properties had been sold the appellant filed an application before the Deputy Registrar for an order setting aside the sale on the ground that there had been material irregularity and fraud in connection with the proclamation and conduct of the sale. This application was rejected. The appellant then appealed to the Registrar, who confirmed the order of the Deputy Registrar dismissing the plaintiff's objections to the sale. Thereupon the appellant filed a suit in the Court of the Subordinate Judge of Chittoor for a decree declaring that the sale was fraudulent and that all the proceedings in execution were vitiated by material irregularities. The Subordinate Judge held that the suit did not lie as the Co-operative Societies Act and the rules framed thereunder had the effect of ousting the jurisdiction of the Civil Court. The appeal is against the decree dismissing the suit.

The rules framed under the Act provide the procedure to be adopted in matters of execution of orders passed under the Act. They embody broadly the provisions of Order 21, rules 89, 90, 92, 93 and 94 of the Code of Civil Procedure, but sub-rule (3) of rule 92, which says that no suit to set aside an order made under the rule shall be brought by a person against whom the order is made, finds no counterpart in the rules framed under the Act. The rules certainly provide ample machinery for the execution of orders and for the hearing and determination of objections to sales in execution.

---

*Appeal No. 214 of 1944. 17th April, 1945.

In deciding that the jurisdiction of the Civil Court is ousted the learned Subordinate Judge relied on the judgment of Wadsworth, J., in *Subbayya* v. *Thippa Reddi*[1], where the facts were very similar to the facts in the present case except that no application for an order setting aside the order in execution was filed. The learned Judge held that the jurisdiction of the Civil Courts was ousted by reason of the fact that special machinery had been provided by statute for the execution of such orders. This judgment was approved of by the Full Bench of this Court which decided *Secretary of State for India* v. *Jagannadham*[2].

It is not necessary that the jurisdiction of the Civil Courts should be expressly excluded. The exclusion can be implied. Where we have, as we have here, the same machinery for the execution of orders and the hearing of objections to sales in execution under the Act as are to be found in the Code of Civil Procedure, the only reasonable conclusion is that the Legislature intended the jurisdiction of the Civil Courts to be removed. Moreover, the Registrar is given extraordinary powers. For instance, by reason of rule 22 (10) (*iii*) he can set aside a sale notwithstanding that no application has been made in that behalf or on grounds other than those alleged in an application which has been made and rejected. Under clause (*vi*) of sub-rule (10) a right of appeal is given provided it is brought within one year from an order passed by the Deputy Registrar. Section 57 of the Act gives the Provincial Government full powers of revision.

The matter does not even rest there. Section 48 of the Co-operative Societies Act says that save in so far as is expressly provided by the Act no Civil Court shall take cognizance of a matter connected with the winding up or dissolution of a Society under the Act. The order which was passed against the plaintiff was an order passed in connection with the liquidation of the Society of which he was a member. It was found to be necessary to wind up the Society and therefore all persons who owed money to it were called upon to pay. We think that section 48 can in such a case as this be read as an express exclusion of the jurisdiction of the Civil Courts.

For these reasons we hold that the Subordinate Judge was right. Accordingly we dismiss the appeal with costs ; one set to the second respondent and one set to the first and fourth respondents. As the appellant has appealed *in forma pauperis* he must pay the required court-fee to Government.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI.

Penumatsa Rangaraju .. *Petitioner**

v.

Sait Devichand Bhootaji Firm partner Sait Seshmull Kasturji and another .. *Respondents.*

Negotiable Instruments Act (XXVI of 1881), sections 26 and 27—Suit on a promissory note—Executant described as a partner in a firm—Whether other partners can be made liable.

Where the executant of a promissory note describes himself as a partner in a firm and the money is borrowed for the firm and the executant has power as managing partner to execute promissory notes binding the firm, but the suit by the promisee is based solely on the promissory note,

Held, the other partners cannot be made liable on the promissory note as section 27 of the Negotiable Instruments Act involves the consequence that, so far as making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque are concerned, those acts must, in order to bind the firm, be done by a partner in the name of the firm and it is not sufficient that they are done in any other manner expressing or implying an intention to bind the firm, which, under section 22 of the Partnership Act, would otherwise be sufficient to bind the firm, for the latter section must yield to the special provisions of the Negotiable Instruments Act. The description of the executant in the preamble to the promissory note as a partner of a named firm is perfectly consistent with his executing the note as the party liable on the note and cannot be taken, on a fair interpretation of the instrument as disclosing the name of the firm as the party liable thereon.

1. (1939) 2 M.L.J. 604.
2. (1941) 2 M.L.J. 47 : I.L.R. (1941) Mad. 850 (F.B.).

* C. R. P. No. 809 of 1944. 27th March, 1945.

Pattabhirami Reddi v. *Kamisetty Balliah*, (1928) 55 M.L.J. 574; *Sreenivasayya* v. *Nagappa*, (1936) 71 M.L.J. 738 and *Sivagurunatha* v. *Padmavathi*, (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.), referred to.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Amalapuram, dated 13th December, 1943, and passed in S. C. S. No. 40 of 1941.

K. Venkataramaraju for Petitioner.

Kasturi Seshagiri Rao, P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—The short question for determination in this civil revision petition is whether the second defendant, petitioner herein, can be made liable on a promissory note executed by his partner, the first defendant. The Court below has found that the first defendant was the managing partner of a rice mill business carried on in partnership with the second defendant and others under the name of Sri Kusumaharinadha Rice Mill at Amalapuram in East Godavari District, and that the money was borrowed for the purposes of the business. On these findings it has passed a decree for the sum claimed with interest and costs against both the defendants personally and also against the assets of the firm.

The promissory note runs thus :

> "Promissory note executed and delivered on 10th December, 1939, corresponding to Sunday, the 30th day of Karthika Bahula of the year Pramadi, in favour of Sait Devichand Bhutaji Garu, resident of Amalapuram, by Kalidindi Narayanaraju Garu's son Satyanarayanaraju, partner of Sri Kusumaharinadha Rice Mill and resident of the said village.
>
> On account of my necessity this day, namely, for the purpose of doing paddy business, in the Mill, the amount borrowed in cash from you is Rs. 600-0-0 (Rupees Six hundred). I shall, on demand, pay you or your order in cash in one lump sum, the said sum with interest thereon at Re. 0-15-0 (fifteen annas) per cent. per mensem from this day till the amount is received, get the payment endorsed on the reverse and take back this note. As you have now paid in cash the consideration hereunder (*i.e.*) rupees six hundred, I have received the same. This is the promissory note executed and delivered with my consent.
>
> (Sd.) Kalidindi Satyanarayanaraju,
> 10th December, 1939."

It is not disputed that the first defendant is liable under the note and no question accordingly arises under section 28 of the Negotiable Instruments Act. Nor is it disputed that the first defendant had power as managing partner to execute promissory notes binding on the firm. And it is recited in the note itself that the money was borrowed for the purposes of the partnership business. In these circumstances, there can be no question but that under sections 19 and 22 of the Indian Partnership Act, 1932, the debt is binding on the firm, but the suit having been based solely on the note, the question arises as to whether the note has been executed in such a form as to make the petitioner also liable on the note as a partner. Section 27 of the Negotiable Instruments Act enacts that every person capable of binding himself or of being bound as mentioned in section 26 may also bind himself or be bound by a duly authorised agent acting *in his name*. This involves the consequence that, so far as the making, drawing, acceptance, indorsement, delivery and negotiation of a promissory note, bill of exchange or cheque are concerned, these acts must, in order to bind the firm, be done by a partner in the name of the firm, and it is not sufficient that they are done in any other manner expressing or implying an intention to bind the firm, which, under section 22 of the Partnership Act, would otherwise be sufficient to bind the firm, for the latter section must yield to the special provisions of the Negotiable Instruments Act.

It is not, however, necessary that the note should be signed by the partner in the name of the firm but the name of the firm as the party liable on the note must be sufficiently disclosed (see *Pattabhirami Reddi* v. *Kamisetty Balliah*[1]). Neither the recital in the note that the borrowing was for the purposes of the rice mill business nor the description of the executant in the preamble as a partner of the firm can, for the reasons indicated above, be regarded as sufficient to disclose that the firm is the party liable on the note (cf. *Sreenivasayya* v. *Nagappa*[2]).

1. (1928) 55 M.L.J. 574. 2. (1936) 71 M.L.J. 738.

It has no doubt been held by a Full Bench of this Court in *Sivagurunatha* v. *Padmavathi*[1] that where the maker of a promissory note added to his description in the preamble of the note the statement that he was " the agent under power of attorney " of another, he must be taken to have indicated that he executed the instrument in his capacity as agent and that the principal and not the executant was liable on the note, although he signed the note without adding words indicating the capacity in which he signed. This decision, however, proceeded on the use of the words " agent under power of attorney of etc." as a form commonly employed in promissory notes drawn in vernacular to indicate that the maker executes the note only in his capacity as agent so as to exclude his personal responsibility. It was observed :

" The words are almost invariably regarded as limiting and qualifying the liability and not merely as describing or identifying the executant."

But the description of the executant in the preamble as a partner of a named firm is perfectly consistent with his executing the note as the party liable on the note and cannot be taken, on a fair interpretation of the instrument, as disclosing the name of the firm as the party liable thereon. It follows that the petitioner cannot be held liable on the promissory note in question.

The civil revision petition is allowed and the suit is dismissed with costs throughout so far as the petitioner is concerned.

V.P.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

Eswardoss Kalidoss .. *Petitioner.**

Criminal Procedure Code (V of 1898), sections 195 (1) (b) and 476 and Penal Code (XLV of 1860), section 211—Complaint to the Assistant Commissioner of Police—Charge-sheet filed—Accused discharged by Chief Presidency Magistrate—Evidence of complainant at enquiry irreconcilable with statements in the complaint—Complaint by Assistant Commissioner of Police for an offence under section 211, Penal Code—Complaint transferred to the Third Presidency Magistrate—The Third Presidency Magistrate has no jurisdiction to take cognizance of the case without a complaint from the Chief Presidency Magistrate.

The petitioner complained to the Assistant Commissioner of Police alleging that an offence has been committed and the police filed a charge sheet against the accused before the Chief Presidency Magistrate and the accused was discharged. As the evidence of the petitioner during the enquiry and certain of his statements in the complaint were irreconcilable the Assistant Commissioner filed a complaint against him for an offence under section 211 of the Penal Code. The complaint was transferred to the Third Presidency Magistrate.

Held, that the offence alleged to have been committed was committed in relation to the proceedings in the Court of the Chief Presidency Magistrate, and hence the Third Presidency Magistrate had no jurisdiction to take cognizance of the case without a complaint from the Chief Presidency Magistrate in accordance with the provisions of sections 195 (1) (*b*) and 476 of the Criminal Procedure Code.

Ahmed v. *Emperor*, A.I.R. 1927 Cal. 478, followed; *Emperor* v. *Prag Dutt*, (1928) I.L.R. 51 All. 382, distinguished ; and *Registrar, High Court, Madras* v. *Kodangi*, (1930) 62 M.L.J. 425 : I.L.R. 55 Mad. 611 (F.B.), referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Third Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras, dated 2nd February, 1945, and made in C. C. No. 2945 of 1944.

A. Bhujanga Rao for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court made the following

ORDER.—The petitioner presented a complaint to the Assistant Commissioner of Police, Crime, Madras, against a certain R. V. Bhat alleging that he had committed an offence under section 406 of the Penal Code in respect of a number of diamonds, valued at Rs. 20,000 entrusted to him by the petitioner. The police filed a charge-

1. (1941) 1 M.L.J. 441 : I.L.R. (1941) Mad. 513 (F.B.).

*Crl. R. C. No. 180 of 1945. 30th April, 1945.
(Crl. R. P. No. 169 of 1945).

sheet on the basis of this complaint in the Court of the Chief Presidency Magistrate and the case resulted in the discharge of the accused. In the course of the enquiry the petitioner gave evidence which, in the opinion of the prosecution, was irreconcilable with certain of the statements made in the complaint; and the Assistant Commissioner thereupon filed a complaint against him for an offence under section 211 of the Penal Code. This complaint was transferred to the file of the Third Presidency Magistrate and the preliminary objection was raised that the Third Presidency Magistrate had no jurisdiction to try the case without a complaint from the Chief Presidency Magistrate in accordance with the provisions of section 195 (1) (*b*) read with section 476 of the Criminal Procedure Code. This objection was overruled by the Third Presidency Magistrate, and the petition now under consideration is against his order.

Section 195 (1) (*b*) of the Criminal Procedure Code enacts that:

"No Court shall take cognizance of any offence punishable under any of the following sections of the Indian Penal Code, namely, sections (here a number of sections are enumerated of which section 211 is one) when such offence is alleged to have been committed in, or in relation to any proceeding in any Court except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

The offence alleged in the present case was not of course committed in the proceeding in the Chief Presidency Magistrate's Court which resulted in the discharge of R. V. Bhat. The question for determination is whether the offence constituted by the alleged false complaint should be regarded as an offence committed in relation to the proceedings in the Chief Presidency Magistrate's Court.

Neither the learned Crown Prosecutor nor the learned counsel for the petitioner has been able to refer me to any decision of this Court which is directly in point. Learned counsel for the petitioner relies on a decision of the Calcutta High Court in *Ahmed* v. *Emperor*[1]. In that case a complaint of theft to the police was prosecuted by them and resulted in a trial in a Sessions Court. The accused was acquitted and the Sessions Judge, holding that the charge was false, made a complaint under section 476 of the Criminal Procedure Code of an offence under section 211 of the Penal Code. The learned Judges of the Calcutta High Court held that the false charge to the police, even though the offence was committed before the proceedings began in the Sessions Court, must be regarded as a matter relating to the proceedings in the Sessions Court since it was the basis of those proceedings. *Ahmed* v. *Emperor*[1] is not distinguishable from the present case. My attention, however, has been drawn to the case of *Emperor* v. *Prag Datt*[2] decided by Dalal, J., in which it is said a different view is taken. This is not quite correct. In *Emperor* v. *Prag Datt*[2], there had been a complaint to the police which resulted in no further proceedings, and then a complaint by the same person on the same facts to a Magistrate. Dalal, J., held that a Magistrate could take cognizance of a complaint by the police in respect of the complaint to them. It may be doubted whether this view could be taken in Madras; but it is unnecessary to decide the question as the fact that there were two complaints and that the complaint to the police did not directly result in proceedings in any Court clearly distinguishes *Emperor* v. *Prag Datt*[2] from the present case.

As already stated there seems to be no decision of this Court which is directly in point; but the view expressed by the learned Judges of the Calcutta High Court in *Ahmed* v. *Emperor*[1] is, in my opinion, in accordance with the judgment of a Full Bench of this Court in *Registrar, High Court, Madras* v. *Kodangi*[3]. The question referred to the Full Bench in that case was:

"When a charge is made by a complainant to the police against more than one individual and the police while charging before the Court one or more of such individuals of the offence complained of, do not charge them all, is a complaint of the Court under section 476 of the Code of Criminal Procedure necessary to prosecute the complainant under section 211, Indian Penal Code, in respect of the person or persons whom the police have not charged before the Court?"

1. A.I.R. 1927 Cal. 478.
2. (1928) I.L.R. 51 All. 382.
3. (1930) 62 M.L.J. 425: I.L.R. 55 Mad. 611 (F.B.).

The answer given by the Full Bench was that the Court had no jurisdiction to take action under section 476 against the complainant in respect of the individuals not charged. The question referred does not of course cover the present case; but it seems to me clear that the underlying assumption in the order of reference and in the judgment of the Full Bench is that there would have been no difficulty if the question had been of the prosecution of the complainant in respect of the person charged. In that case the answer would have been that a complaint by the Court was necessary. Wallace, J., indeed observed in delivering the judgment of the Full Bench that:

"In a case under section 211, I. P. C., when the police or the complainant or any one else brings the charge, which is the subject-matter of the offence, to trial in a Court, then it may be fairly contended that the offence has been committed in relation to a proceeding in the Court."

I have, therefore, no hesitation in following the decision in *Ahmed* v. *Emperor*[1]. In my opinion, the offence alleged to have been committed by virtue of the complaint to the Assistant Commissioner of Police—Crime—was committed in relation to the proceedings in C. C. No. 2382 of 1944 in the Court of the Chief Presidency Magistrate; and, that being so, the Third Presidency Magistrate had no jurisdiction to take cognizance of the case against the complainant without a complaint from the Chief Presidency Magistrate. The petition is accordingly allowed, and the proceedings in C. C. No. 2945 of 1944 on the file of the Third Presidency Magistrate are quashed.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Nanjappa Goundan .. *Appellant**

v.

Sreeranga Chettiar .. *Respondent.*

Madras Debt Conciliation Act (XI of 1936), section 14—Mortgage—Agreement between parties—Provision for sale in case of default of payment within time fixed—Sale and purchase of property—Mortgagor depositing in Court amount due before sale confirmation—Whether Order 34, rule 5, Civil Procedure Code (V of 1908) applied.

The agreement entered into in the proceedings before the Debt Conciliation Board constitutes a decree of a Civil Court and is executable as such.

Where such an agreement entered into between the parties (of a mortgage transaction) before the Debt Conciliation Board under section 14 (1) of the Madras Debt Conciliation Act and registered under section 14 (2) stated that if default was made in the payment of the amount due within a certain fixed period, the property mortgaged could be sold, and on default being made the property was sold but before the sale was confirmed, the debtor deposited within Court the due amount and asked the Court for the amount being treated as a payment under Order 34, rule 5, Civil Procedure Code.

Held, that Order 34, rule 5 applied to the case as by the operation of the Debt Conciliation Act, the decree in effect was a final mortgage decree without there being a preliminary decree.

Appeal against the order of the Court of the District Judge, Coimbatore, dated 6th December, 1943, and made in A. S. No. 448 of 1943, preferred against the order of the Court of the District Munsiff, Coimbatore, dated 31st August, 1943, and made in E. A. No. 1392 of 1943 in E. P. No. 94 of 1943 in Application No. 25 of 1939, Debt Conciliation Board, Coimbatore.

The Advocate-General (*P. V. Rajamannar*) and *S. R. Subramanyam* for Appellant.

K. V. Ramachandra Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant was indebted to the respondent under a deed of mortgage. The appellant applied to the Debt Conciliation Board, Coimbatore, for a settlement of the debt and the Board decided that the appellant should pay to the respondent a sum of Rs. 664. As a result of this direction an agreement was executed by the parties on the 19th August, 1939, whereby it was agreed that the appellant should pay the amount within a period of four months and that if it

---

1. A.I.R. 1927 Cal. 478.

* A. A. A. O. No. 127 of 1944. 22nd March, 1945.

was not paid within that time the respondent should be at liberty to recover the sum with interest which had accrued thereon and costs by executing the agreement as a decree for the sale of the mortgaged property. Sub-section (2) of section 14 of the Madras Debt Conciliation Act states that an agreement made under the first sub-section (the agreement here was made under that sub-section) shall, within thirty days from the date of the making thereof, be registered under the Indian Registration Act by the chairman of the Board in such manner as may be prescribed and it shall then take effect as if it were a decree of a Civil Court and be executable as such. The agreement was registered and therefore the respondent became entitled to bring the property to sale in the event of the appellant failing to pay what was due to him under the agreement.

The appellant failed to pay what was due and consequently the respondent instituted execution proceedings in the Court of the District Munsiff, Coimbatore. As the result the property was put up for sale on the 1st February, 1943, and was purchased by the respondent. The appellant applied under Order 21, rule 90 of the Code of Civil Procedure to have the sale set aside, but he did not proceed with that application. When making the application under Order 21, rule 90, the appellant paid into Court the amount which he calculated was due to the respondent under the decree. Before the sale was confirmed he asked that that deposit should be treated as a payment under Order 34, rule 5 of the Code. The District Munsiff held that Order 34, rule 5 did not apply and this decision was concurred in by the District Judge on appeal. This appeal is from the order of the District Judge.

We consider that the appellant is entitled to have the money paid into Court treated as a deposit under Order 34, rule 5. The agreement entered into in the proceedings before the Debt Conciliation Board constitutes a decree of a Civil Court and is executable as such. It can only be regarded as a final decree in a mortgage suit. The agreement provides that if default is made in the payment of the amount within four months, the property shall be sold. It has been suggested that Order 34, rule 5 can only apply where there has been a previous preliminary decree. In an ordinary mortgage suit there must be a preliminary decree, but we have here by the operation of the Debt Conciliation Act what is in effect a final mortgage decree without there being a preliminary decree and we think that Order 34, rule 5 applies. It would indeed be most unjust if the mortgagor were precluded from redeeming his property and that is what the respondent wants. If the respondent gets all that is due to him under the agreement, which now constitutes a decree of a Civil Court, he will get all that he is in law entitled to.

In the judgment of the learned District Judge it is pointed out that the amount deposited is only Rs. 825 whereas the correct amount is Rs. 844-9-6. There was no objection taken below to the deficiency in the deposit. The appellant will be allowed to make up the deficiency as the sale had not been confirmed until his application was dismissed by the District Munsiff.

The appeal is allowed with costs here and below in the proceedings under Order 34, rule 5. It follows that the order of the District Judge with regard to costs is vacated.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Applicant**

v.

Messrs. AR. M. M. Firm (Penang) by partner, Sri A. Y. AR. M. Muthukaruppan Chettiar, Karaikudi .. *Respondent.*

Income-tax—Deduction—Trading loss—Share of a bad debt obtained by a partner on dissolution of his partnership with his brother—Such share, valued at a nominal figure and treated as an asset of a new firm started

* Case Referred No. 39 of 1944. 23rd February, 1945.

by him along with his sons—Right of new firm to claim deduction of the sum, representing face value of the share of the bad debt as a trading loss.

A money-lending partnership of two brothers advanced a sum of 5,000 dollars on a second mortgage to a customer of the firm. As the chances of its recovery became very doubtful, it was written down in the books of the firm to 5 dollars. This partnership was dissolved and each brother took a half share of the assets and undertook to pay half of the liabilities. Thereafter one of the brothers, the managing partner of the assessee firm, started along with his sons a new business under a new vilasam, the assessee firm. The half share of the bad debt obtained by the managing partner of the new firm at the dissolution of his former partnership with his brother was entered in the books of the new firm at the figure of 2·50 dollars. On a contention by the assessee firm that in calculating its profits it was entitled to deduct as a trade loss, the sum of 2,500 dollars being the half of the sum actually lent by the dissolved partnership.

Held, that the assessee firm would not be entitled to this deduction unless it represented the trading loss incurred during the year of account. As the assessee firm was an entirely different entity from the dissolved partnership firm and as the value of the asset in question so far as the assessee firm was concerned was really nil, no loss was sustained by it during the year of account in that connection. Hence the assessee firm was not entitled to the deduction claimed.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922, as amended by section 92 of the Indian Income-tax (Amendment) Act, 1939, in Application No. 66, R. A. No. 46, Madras of 1943-44 on its file.

C. S. Rama Rao Sahib for Applicant.

A. C. Sampath Aiyangar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The managing partner of the assessee firm formerly carried on a money-lending business in partnership with his brother at Penang under the vilasam of A. Y. AR. At the end of 1939 the A. Y. AR. firm was dissolved and Muthukaruppan Chettiar started a new business at Penang under the vilasam of AR. M. M. He had four sons, who were joint with him, and the new business belonged to the family. While the A. Y. AR. firm was carrying on business it advanced the sum of $ 5,000 to a customer of the firm on a second mortgage of immoveable property. It became apparent that the chances of recovering this debt were very doubtful and succeeding agents of the firm refused to take it over at the face value. In consequence, it was written down in the books of the A. Y. AR. firm to $ 5. When the A. Y. AR. partnership was dissolved, each brother took a half share of the assets and undertook to pay half of the liabilities. Under this arrangement, Muthukaruppan Chettiar became entitled to a half share of the second mortgage and when he started the new business with his sons it was entered in the books at the figure of $ 2·50.

The new business started on the 13th April, 1940. The year of account with which this case is concerned commenced on that date. Muthukaruppan Chettiar, as the manager of the AR. M. M. firm, contended that in calculating the profits of the firm for 1940-41 it was entitled to deduct as a trade loss the sum of $ 2,500 being half of the sum of $ 5,000 which the A. Y. AR. firm had lent on the second mortgage. The Income-tax Officer rejected this contention, but he allowed a deduction of $ 30 made up of the $ 2·50 and expenses which the firm had incurred in connection with the debt. The assessee appealed to the Appellate Assistant Commissioner, who held that the firm was entitled to deduct $ 2,524 being half of the $ 5,000 plus expenses.

The Income-tax Commissioner through the Income-tax Officer contested the validity of this order before the Income-tax Appellate Tribunal, Calcutta Bench. The Tribunal held that the Commissioner was not entitled to raise the question because it had been put forward at a late stage and the Income-tax Officer had decided that the assessee was entitled to a deduction ; although he had limited it to $ 30. The Tribunal did, however, hear the appeal and it decided it against the Income-tax authorities. At the request of the Commissioner the Tribunal has referred to this Court for decision, the following questions :

" 1. Whether in the circumstances of the case, it was open to the Income-tax Officer to appeal to the Appellate Tribunal under section 33 (2) on the ground that no part of the bad debt was an admissible deduction under the Income-tax Act.

2. "Whether in the circumstances of the case, the respondent firm is entitled in law to the allowance of the claim of 2,524 dollars as a deduction from its income from business."

We consider that the Tribunal erred in holding that the Income-tax Officer was not entitled to prefer the appeal because the contention which was raised therein was belated and the Income-tax Officer had agreed in principle to a deduction. The appeal was preferred on the instructions of the Commissioner who had the right to raise the question of the validity of the Appellate Assistant Commissioner's order. The appeal was heard after full notice to the assessee, who was in no way taken by surprise. It involved a question of law and one which called for decision.

We are also of opinion that the Appellate Assistant Commissioner and the Tribunal erred in holding that the assessee was entitled to a deduction of $2,524. The assessee cannot be entitled to this deduction unless it represents a trading loss incurred during the year of account. It must be borne in mind that the assessee firm is an entirely different entity from the A.Y. AR. firm. In deciding what was the assessable income of the AR. M. M. firm during the year of account regard can only be had to what it started with and what was the position at the end of the period. One of its assets was a half share of this second mortgage. We are not concerned with the figure at which it stood in the A.Y. AR. firm's books or with the figure at which the half share stood in the books of the assessee firm. Its real value on the 13th April, 1940, must be ascertained. Now it has turned out that it had then no value. The record discloses that the first mortgagee took steps to bring the property to sale and the proceeds were not sufficient to pay off his prior loan. It is true that we have got to look at subsequent events to see what the value was on the 13th April, 1940; but subsequent events clearly indicate that its value was nil. In these circumstances, no loss was sustained by the assessee firm during the year of account in this connection.

In this view it is unnecessary to discuss *Chimanlal Rameswar Lal* v. *Commissioner of Income-tax*[1] and In re *the Commissioner of Income-tax, Burma* v. *P. L. S. M. Firm*[2], which were quoted to us in the course of the argument.

The answer we give to the second question is that the assessee is not entitled to a deduction of the sum of $ 2,524.

As the reference has succeeded, the respondent must pay the costs, Rs. 250.

V.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

R. N. Kapur, partner of Messrs. Wright and Co. .. *Appellant**

v.

The Travancore National and Quilon Bank, Limited (in liquidation) by Official Liquidator and others .. *Respondents.*

Limitation Act (IX of 1908), Article 85—Applicability—Banker and customer—Current account with overdraft facilities—If "mutual, open and current" account.

Where a customer is permitted to overdraw a current account with his bank and the account is sometimes in credit and sometimes in debit, the bank is a debtor when the account is in credit and when the account is overdrawn the customer is under an obligation to the bank. In such circumstances the account can only be regarded as a "mutual, open and current" account to which article 85 of the Limitation Act applies.

Hirda Basappa v. *Gadigi Muddappa*, (1871) 6 M.H.C.R. 143; *Narrandas Hemraj* v. *Vissandas Hemraj*, (1881) I.L.R. 6 Bom. 134 and *Punjab United Bank, Ltd. (in liquidation)* v. *Muhammad Hussain*, (1934) I.L.R. 15 Lah. 652, relied on.

Hajee Syud Mahomed v. *Mst. Ashrufoonnissa*, (1880) I.L.R. 5 Cal. 759, dissented from.

Appeal under clause 15 of the Letters Patent against the judgment of Byers, J., dated 27th October, 1942, and passed in C. C. C. A. No. 5 of 1944, preferred against the decree of the City Civil Court, Madras, in O. S. No. 261 of 1941.

---

1. (1940) 8 I.T.R. 408. 2. (1934) I.L.R. 12 Rang. 483.

* L. P. A. No. 8 of 1945. 5th April, 1945.

P. Sivaramakrishniah for *M. Ranganatha Sastri* for Appellant.

B. V. Viswanatha Aiyar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether Article 85 of the Indian Limitation Act applies to a case where a customer of a bank has a current account which at times is in credit and at other times is in debit, the bank having granted to the customer the right to overdraw.

The appeal arises out of a suit filed by the Official Liquidators of the Travancore National and Quilon Bank, Ltd., to recover from the partners of a firm of stock brokers carrying on business in Madras under the style of Wright and Co., money overdrawn by them on a current account with the bank. There were two partners, the appellant (the first defendant) and V. H. Ramaswamy (the second defendant). The defendants opened the account on the 16th April, 1936. On the 31st August, 1936, the bank agreed to allow them to overdraw the account to the extent of Rs. 10,000 on the furnishing of collateral security. On the 21st October, 1936, the accommodation was increased to Rs. 13,200. As security the partners executed promissory notes in favour of the bank and deposited shares which they held in limited liability companies, the share certificates being accompanied by transfer forms signed in blank and letters authorising the bank to sell the securities should they so desire. The bank had the right of calling in the overdraft at any moment. The account was operated on regularly until the bank went into liquidation at the end of June 1938. At that time the defendants had overdrawn the account to the extent of Rs. 6,030. The liquidators sold the shares held as security but the proceeds were not sufficient to discharge the defendants' liability in full. There remained a balance due to the bank of Rs. 3,478 and the Official Liquidators asked for a decree directing payment of this sum. The second defendant did not defend the action, but the first defendant did. He maintained that the suit was barred by reason of Article 57 of the Indian Limitation Act. On behalf of the Official Liquidators it was contended that the claim was governed by Article 85. This argument prevailed and the City Civil Judge decreed the suit. The first defendant appealed to this Court. The appeal was heard by Byers, J., who agreed with the trial Court. This appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

Article 85 states that the period of limitation for a suit for the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties, shall be three years from the closing of the year in which the last item admitted or proved is entered in the account. Admittedly, if this article applies, the suit was in time and the decree was properly passed against both the defendants.

At all material times the account was open and current. The only question is whether it was a mutual account. The leading case in India on the question of mutuality is *Hirda Basappa* v. *Gadigi Muddappa*[1] where Holloway Acting Chief Justice said that in order that an account might be mutual there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. It has been held that a shifting balance is not a conclusive test of mutuality. The importance to be attached to a shifting balance will depend on the particular facts of the case. Most of the decisions cited do not relate to banking accounts, but to accounts between ordinary traders. The cases which call for notice here will be referred to later. At the moment we propose to examine the position between the customer and the bank where the customer is permitted to overdraw a current account and the account is sometimes in credit and sometimes in debit, as was the case here.

When a person opens a current account with a bank and pays money into it, the money goes into the general funds of the bank which uses it for the purposes of its business. While the account is in credit the bank is a debtor to the customer.

1. (1871) 6 M.H.C.R. 142.

The customer can demand payment in whole or in part by drawing on the account. If the bank allows the customer to overdraw the account and he does so, he becomes a debtor to the bank and the bank in its turn is entitled to demand repayment of the overdraft without closing the account. Where the balance is a shifting one the bank is under an obligation to the customer when the account is in credit and must meet his demand for payment; likewise when the account is overdrawn the customer is under an obligation to the bank and in law is bound to comply with the bank's demand for payment, when made. It seems to us that in these circumstances the account can only be regarded as a mutual account fulfilling the test laid down in *Hirda Basappa* v. *Gadigi Muddappa*[1].

In referring to clause 87 of the Limitation Act of 1871 to which article 85 of the present Limitation Act corresponds Sargent, J. said in *Narrandas Hemraj* v. *Vissandas Hemraj*[2]:

> "The latter part of clause 87 of Act IX of 1871, which is intended to define more particularly the class of cases contemplated by the clause, is far from clear. Literally construed, it would confine the clause to those cases only in which both parties have, in the course of their dealing, made actual demands on one another. The more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties—in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other."

In the course of his judgment Sargent, J., quoted from the judgment of Norman, J., in *Ghaseeram* v. *Manohar Doss*[3] where Norman, J., said:

> "The plaintiff remits moneys to the defendants. He thus advances money, and has a right to sue as for money lent or received for his use. On the other hand, the defendants are shown to make advances by paying hundis drawn on them apparently without waiting to see whether they are in funds or not. The defendants, therefore, in like manner, are from time to time in a position to sue for moneys lent by them in the course of their business to the plaintiff. There is thus a course of mutual lending and dealings apparently as between bankers."

The judgments of Sargent, J. and Norman, J., both support the opinion which we have expressed, and further support is to be found in the judgment of the Lahore High Court in *Punjab United Bank, Ltd. (in liquidation)* v. *Muhammad Hussain*[4], where it was held that Article 85 applies to a current account where the customer is granted overdrawing facilities, because there are obligations on both sides. Each party can say to the other, "I have an account with you," and can make a demand.

For the appellant reliance has been placed upon the observation of Pontifex, J., in *Hajee Syud Mahomed* v. *Mst. Ashrufoonnissa*[5]. There the owner of an indigo factory had an account with a bank which was usually overdrawn, although at times there was a balance in favour of the customer. Pontifex, J., considered that this could not be described as a mutual, open and current account because he did not think that the customer could at any time have said: "I have an account against you, the banker." From what we have said it follows that we do not agree with this opinion. Of course if the account is always in credit or is opened with a debit and it remains in debit the position will be different because there will then be no mutuality. Here there was mutuality and as the account was also open and current Article 85 applies.

The appeal is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Rajamayyar *alias* Subramania Iyer .. *Appellant**

v.

Venkatasubba Iyer and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 34, rule 5 and section 146—Sub-mortgagee impleaded as defendant in suit for sale brought by the original mortgagee—Right to apply for final decree.

1. (1871) 6 M.H.C.R. 142.
2. (1881) I.L.R. 6 Bom. 134.
3. 2 Ind. Jur. N.S. 241.
4. (1934) I.L.R. 15 Lah. 652.
5. (1880) I.L.R. 5 Cal. 759.

* S. A. No. 393 of 1944. 20th March, 1945.

Having regard to the derivative character of a sub-mortgage as an assignment of the mortgage right by the original mortgagee by way of charge, there is no obvious reason why the sub-mortgagee as a person claiming under the original mortgagee should not on the general principle recognised in section 146 of the Code of Civil Procedure, be entitled to apply for a final decree for sale of the mortgaged property where the original mortgagee plaintiff fails to make such application.

A sub-mortgagee impleaded as a defendant in a suit for sale brought by the original mortgagee is entitled to apply for a final decree even though the preliminary decree for sale which ascertained the amount due to him contained no provision authorising him to make such an application on default of payment by the mortgagor of the amount due to the original mortgagee. The question whether a party to a mortgage suit is entitled to apply for a final decree for sale must be determined rather with reference to the rights and reliefs declared and awarded under the preliminary decree than with reference to his place in the array of parties.

Vedavyasa Iyer v. *Madura Hindu Labha Nidhi, Co., Ltd.*, ((1918) 35 M.L.J. 639 : I.L.R. 42 Mad. 90, distinguished.

Abdulla Sahib v. *Shaffe Mahomed Sahib*, (1945) 1 M.L.J. 96, applied.

Appeal against the decree of the District Court, Coimbatore, in A. S. No. 145 of 1943, preferred against the order of the Court of the Subordinate Judge of Coimbatore in I. A. No. 126 and 158 of 1941 in O. S. No. 30 of 1938.

K. V. Ramachandra Aiyar and *T. N. Sundaresa Aiyar* for Appellant.

N. Sivaramakrishna Aiyar and *R. Desikan* for Respondents.

The Court delivered the following

JUDGMENT.—The question that falls to be decided in this second appeal is whether a sub-mortgagee impleaded as a defendant in a suit for sale brought by the original mortgagee is entitled to apply for a final decree where the preliminary decree for sale ascertained the amount due to him but contained no provision authorising him to make such an application on default of payment by the mortgagor of the amount due to the original mortgagee.

The defendants 1 and 2 in the suit executed, along with another a simple mortgage for Rs. 2,000 in favour of the plaintiff's father in respect of the suit properties on 22nd September, 1920. The plaintiff's father sub-mortgaged his mortgage right to secure a sum of Rs. 1,500 borrowed from the third defendant on 12th October, 1927 and effected a further sub-mortgage for Rs. 500 on 7th December, 1929 in favour of defendants 4 and 5. On the adjudication of the fifth defendant as insolvent his interest in the sub-mortgage vested in the Official Receiver, the seventh defendant; and eventually passed by transfer to the defendants 8 to 10 who have since been substituted in the place of defendants 5 and 7. The original mortgagee sued to enforce the mortgage and a preliminary decree for sale was passed on 5th March, 1938, fixing 5th June, 1938, for payment of the amount declared due. On 5th March, 1941, defendants 8 to 10 filed an application (I. A. No. 126 of 1941) for passing a final decree in the suit, the mortgagor not having paid the amount due as directed by the preliminary decree, and the third defendant made a similar application (I. A. No. 158 of 1941) on 15th March, 1941, which was followed by an another application made by him I. A. No. 43 of 1942, dated 10th January, 1942, to transpose him as the second plaintiff. All these applications were opposed by the defendants 1 and 2 on the ground *inter alia* that neither under the terms of the preliminary decree nor under the law were the defendants 3 and 8 to 10 entitled to initiate proceedings for a final decree being passed in the suit and that transposition of the third defendant as the second plaintiff would not, even if ordered, avail him as on the date on which I A. No. 43 of 1942, was filed, an application for a final decree would be time barred. The trial Court overruled the objection, transposed the third defendant as second plaintiff, and passed a final decree for sale after scaling down the debt in accordance with the provisions of the Madras Agriculturists' Relief Act, 1938. An appeal to the lower appellate Court having proved unsuccessful, the second defendant has brought this second appeal.

It has been held that article 181 of the Limitation Act governs an application for a final decree in a suit for a sale or foreclosure, (See *Subbalakshmi Ammal* v. *Ramanuja Chetti*[1]), and the application by the third defendant for his transposition as second plaintiff having been made more than three years after the date fixed for

1. (1918) 35 M.L.J. 552 : I.L.R. 42 Mad. 52.

payment under the preliminary decree, such transposition cannot avail him, and his application for a final decree which no doubt was made within time must be dealt with as one made by him as the third defendant in the suit.

Now, the preliminary decree, after declaring the amounts respectively due to the plaintiff and the third defendant directed that the defendants 1 and 2 should pay into Court on or before the 5th day of June, 1938, the sum declared due to the plaintiff with further interest till date of payment, that on such payment the plaintiff should deliver up all documents in his possession relating to the mortgaged property to defendants 1 and 2 and that the amount deposited should be paid to the third defendant, the defendants 4, 5 and 7, and the balance if any to the plaintiff, and it provided that on default of payment as aforesaid, "the plaintiff may apply to the Court for a final decree for the sale of two-fifths of the mortgaged properties" (a third party having established his right to three-fifths of the same). The decree also contained further provisions for payment of the sale proceeds to the parties in the same order of priority, payment to the defendants 4, 5 and 7 however being directed to be made on their sub-mortgage being "proved in the final decree." It is argued for the appellant that the preliminary decree authorised only the plaintiff to apply for a final decree on default of payment by the mortgagors, and that, therefore, it is not competent for the sub-mortgagees who were defendants in the suit to make such applications, and reference was made in support of the argument to Order 34, rule 5 (3) which provides that in case of default of payment as directed by the preliminary decree the Court shall "on application by the plaintiff" pass a final decree directing a sale of the mortgaged property. I am unable to accept the argument. Rule 5 (3) contemplates the normal case where a mortgagee who sues to enforce his mortgage is assumed to apply for a final decree on default of payment by the mortgagor, and the preliminary decree in this suit, also proceeds on the same assumption. It is not correct, in my opinion, to read either the rule or the preliminary decree as implying that none else shall have the right to make an application for a final decree in case of the mortgagor's default. The question whether a party to a mortgage suit is entitled to apply for a final decree for sale must, it seems to me, be determined rather with reference to the rights and reliefs declared and awarded under the preliminary decree than with reference to his place in the array of the parties. That a person entitled to apply for a final decree for sale need not necessarily appear as a plaintiff on the record is shown by the form prescribed for a preliminary decree for sale in a suit for sale by a sub-mortgagee against the mortgagor and the original mortgagee (Form No. II of Appendix D, Schedule I of the Code). No doubt the form contemplates the original mortgagee defendant paying the amount declared due to the sub-mortgagee plaintiff, and applying for a final decree for sale against the mortgagor who makes default in payment of the amount due to the original mortgagee; but the point is that if, according to the appellant's construction of Order 34, rule 5 (3) the plaintiff alone can apply for a final decree in a suit for sale and no other, the aforementioned form would be inconsistent with that provision. Indeed, the contention overlooks the derivative character of a sub-mortgage as an assignment of the mortgage right by the original mortgagee by way of charge, and there is no obvious reason why the sub-mortgagee as a person claiming under the original mortgagee should not, on the general principle recognised in section 146 of the Code of Civil Procedure, be entitled to apply for a final decree for sale of the mortgaged property where the original mortgagee plaintiff fails to make such application.

Reliance was placed on *Vedavyasa Iyer* v. *Madura Hindu Labha Nidhi Co., Ltd.*[1] as supporting the appellant's contention. It was held in that case that where, in a suit brought by a prior mortgagee against the mortgagor and a puisne mortgagee, a decree was passed directing the sale of the mortgaged property and payment, out of the sale-proceeds, not only of the amount declared due to the prior mortgagee but also of the sum found due to the puisne mortgagee if any surplus was left after payment to the former, it was not open to the puisne mortgagee to apply for sale

1. (1918) 35 M.L.J. 639 : I.L.R. 42 Mad. 90.

of the property, for the discharge of the amount due to him if the prior mortgagee's debt was otherwise satisfied. The decision can have no application here, as the sub-mortgagee's position in relation to the original mortgagee is essentially different from that of a puisne mortgagee in relation to the prior mortgagee. Indeed, the learned Judges distinguished an unreported case relating to a sub-mortgagee, observing, "The sub-mortgagee is an assignee of the original mortgagee, and his being allowed to work out his rights by doing what his mortgagor could have done would not confer similar rights on third parties claiming on their own rights."

On the other hand, the recent decision of this Court in *Hajee Abdulla Sahib* v. *Shaffee Mohamed Sahib*[1] supports the respondent's contention. It was a suit for dissolution of an alleged partnership and taking of accounts in which the defendants denied the partnership and preferred a counter-claim alleging that the plaintiff had acted as their commission agent and asked for an account. The Court rejected the plaintiff's claim of partnership but allowed the counter-claim and passed a preliminary decree for the taking of the accounts. At that stage the defendants sought to withdraw their counter-claim but the plaintiff insisted on the accounts being taken. The Court held that, although the preliminary decree was passed at the instance of the defendants, as the taking of accounts might result in a benefit to the plaintiff the latter was entitled to proceed with the matter even if the defendants did not want to proceed. On the authority of the Privy Council ruling in *Lachminarain Marwari* v. *Balmukund Marwari*[2], the decision was based on the broad principle that after a decree has been passed it is open to any party to the suit who would be benefited by its enforcement to initiate further proceedings. In the present case, it cannot be doubted for a moment that the sub-mortgagees would be benefited by a sale of the mortgaged properties and I think the principle referred to above applies.

The appeal is dismissed with costs. Leave refused.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Marudai Pillai P. C. 232 and others .. *Petitioners**

Criminal trial—Sub-Divisional Magistrate to whom papers have been sent under Police Standing Order No. 157—Acts as a "Court" in making inquiries—Not competent to file as a "Court" a complaint of offence when prima facie case is made out—Criminal Procedure Code (V of 1898), section 476—Scope.

A Sub-Divisional Magistrate to whom papers have been sent under Police Standing Order No. 157 making an inquiry and finding a *prima facie* case of an offence made out is not competent to file a complaint for the offence as he was throughout acting as a "Court." A complaint outside the provisions of section 476 of the Criminal Procedure Code cannot be filed under the Court's inherent jurisdiction. When the Code has made provisions for circumstances under which a Court can file a complaint, it must be considered to be exhaustive in respect of it and to limit the powers of the Court in making such complaints. Though the offences may be cognizable ones, where a complaint is made by the Magistrate in his capacity as magistrate and not as an ordinary citizen the proceeding should be quashed as illegal.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order quashing the proceedings in C. C. No. 544 of 1944, on the file of the Court of the Sub-Divisional Magistrate, Musiri.

G. Gopalaswami and *A. R. Krishnaswami* for Petitioners.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

The Court made the following

ORDER.—One Sellamuthu happened to be sent to the Head Quarters Hospital at Trichinopoly in connection with certain injuries found on his person and on information given by him to the District Medical Officer, the Medical Officer thought that the injuries had been caused to him by the police personnel of Turaiyur. As he was of the opinion that the injuries were serious ones likely to result in death, he sent up the papers to the District Magistrate stating that certain allegations

1. (1945) 1 M.L.J. 196.
2. (1924) 47 M.L.J. 441 : L.R. 51 I.A. 321 : I.L.R. 4 Pat. 61 (P.C.).

* Cr. M. P. No. 195 of 1945. 26th April, 1945.

had been made against the police personnel of Turaiyur and that it was desirable that there should be an inquiry and steps taken to see that the culprits were punished, if they had really committed any offence. The District Magistrate on receipt of the papers sent them on to the Sub-Divisional Magsitrate of Trichinopoly who was also in additional charge of the Musiri sub-division within which division the offence, if any, had been committed, to make inquiries and report. The papers evidently appear to have been sent under Police Standing Order No. 157. The Magistrate made inquiries, but by the time he finished his inquiries, another gentleman took charge of the Musiri sub-division but the Sub-Divisional Magistrate of Trichinopoly continued the inquiry and was of the opinion that a *prima facie* case had been made out. He then sent a report to the Sub-Divisional Magistrate of Musiri but the latter wrote back to him saying that he could take action only if a complaint was sent to him. Thereupon the Sub-Divisional Magistrate of Trichinopoly as Rex by the Sub-Divisional Magistrate of Trichinopoly gave a complaint. On that, notice was issued to all the petitioners before this Court, and after inquiry a charge was framed. After the charge was framed the petitioners raised an objection that the Sub-Divisional Magistrate of Trichinopoly had no jurisdiction to file a complaint and that the proceedings started on such a complaint were illegal and that they should be quashed. The Magistrate held that the objection was untenable and overruled it. The very same objection is reiterated here and it is stated that the proceedings should be quashed.

The complaint clearly indicates that it was as that of the Sub-Divisional Magistrate of Trichinopoly it was forwarded to the Sub-Divisional Magistrate of Musiri. As a matter of fact, the latter officer wanted such a complaint. Police Standing Order No. 157 clearly indicates that it is as Sub-Divisional Magistrate he was asked to investigate and report and so it is as a Court that he made the investigation and came to the conclusion that a *prima facie* case had been made out. As pointed out in *Emperor* v. *Kushal Pal Singh*[1], a complaint outside the provisions of section 476 cannot be filed by a Civil, Revenue or Criminal Court under its inherent jurisdiction. My attention has not been drawn to any provisions of the Code of Criminal Procedure except section 190 under which this complaint should have been sent by the Sub-Divisional Magistrate of Trichinopoly. The offences with which the petitioners have been charged are cognizable offences and it is open to any citizen to file a complaint; but then the complaint has not been filed by the Magistrate as an ordinary citizen but by the Sub-Divisional Magistrate of Trichinopoly in his capacity as such Magistrate. There is some difference in the procedure between an inquiry into a complaint by a private individual and a complaint by a Court. This was pointed out in *Emperor* v. *Kushal Pal Singh*[1]. When the Code has made provision for circumstances under which a Court can file a complaint, it must be considered to be exhaustive in respect of it and to limit the powers of the Court in making such complaints. Consequently it cannot be said that the Magistrate had jurisdiction to file the complaint in this case.

It is urged however that even though he had no jurisdiction to file a complaint, still if such a complaint was received, the Sub-Divisional Magistrate of Musiri could act under section 190 (*c*) and take cognizance of the case and the action of the Sub-Divisional Magistrate must be considered to have been taken under that section. If that be so, then under section 191 it is open to the accused to object to the case being tried by the Magistrate and ask for the case being tried by another Magistrate. The petitioners have been deprived of the exercise of such a right by reason of the failure on the part of the Sub-Divisional Magistrate of Musiri to inform the petitioners about it and ask them whether they wanted the case to be tried by another Magistrate.

The charge framed is therefore set aside. The Magistrate will ask the petitioners if they want to have the case tried by another Magistrate and then proceed with the matter according to law.

K.S. ——— *Charge framed set aside.*

---

1. (1931) I.L.R. 53 All. 804 at 812 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

The Province of Madras, represented by the Collector of Madras.. *Appellant**

v.

Assammakkithanakath Puthiya Nalakath Muhammad *alias* Bava (since deceased) and others .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (I of 1900), *section* 3—*Person entering upon waste land of Government and bringing it under cultivation—Customary rent how computed.*

Where the plaintiff brought into cultivation a particular land formed by the receding of the sea without the permission of the person entitled to let the land, namely the Government in this case, and was in occupation thereof as a cultivator and the only point at issue was whether he did so with *bona fide* intention of attorning and paying the customary rent to the Government entitled to let the waste land,

Held, that as between the Government and a person who occupied waste land and brought it under cultivation the customary rent within the meaning of section 3 of Malabar Compensation for Tenants Improvements Act would be the land price *plus* the annual assessment.

In the circumstances, the plaintiff really was willing to pay the price and the assessment and in the words of the Act, he answered the description in section 3 of a person, who, with the *bona fide* intention of attorning and paying the customary rent, brought the land under cultivation.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut in A. S. No. 81 of 1942 preferred against the decree of the Court of the District Munsiff of Tirur in O. S. No. 251 of 1938.

The Government Pleader (*K. Kuttikrishna Menon*) for Appellant.

S. R. Subramanyam for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff was in possession of certain land which was formed by the sea receding in the year 1935 or thereabouts. He first asked for the land being assigned to him and said that he would plant cocoanut trees thereon. Subsequently he seems to have entered upon the property and planted trees. He then asked that out of the lands formed by the recession of the sea, the portion occupied by him might be granted to him. He also said that he was ready to pay any value that might be fixed by the Government for the land in his possession. He wanted permission to pay the sum fixed by the Government. At one stage he seems to have asked that he may not be called upon to pay the value or the land price as it is called, but ultimately he said that he was willing to pay whatever was demanded of him. Under section 3 of the Malabar Compensation for Tenants Improvements Act, the expression "tenant" among other things includes a person who, with the *bona fide* intention of attorning and paying the customary rent to the person, entitled to cultivate or let waste land, but without the permission of such person, brings such land under cultivation and is in occupation thereof as cultivator. Here it is common ground that the plaintiff brought the land under cultivation, that he is in occupation thereof as cultivator and that he entered upon possession of the land without the permission of the person who is entitled to let the land, that person being the Government. The only point at issue is whether he did so with the *bona fide* intention of attorning and paying the customary rent to the person entitled to let the waste land. It is urged by the learned Government Pleader that the respondent-plaintiff offered to pay the assessment on the land and not the customary rent on it. It is a nice distinction; but this distinction does not appear to me to have been presented in either of the lower Courts. There is no evidence to show that in such cases on the West Coast, the Government used to collect what is called the customary rent on waste lands when those lands are occupied by a person who would otherwise fulfil the terms of section 3. So far as one can judge from the record, the Government usually collects only assessment and before issuing a patta the Government also levies what is known as the land price or customary price which in this case is said to be Rs. 15 per acre. I am inclined to think that

* S. A. No. 754 of 1943. 4th April, 1945.

the land price *plus* the assessment every year is tantamount to the customary rent within the definition of section 3. A portion of it is asked to be paid in advance and there is also the annual payment. As between the Government and a person who occupies waste land and brings it under cultivation, that is the customary rent, though in the case of other jenmis it may be that the customary rent is somewhat higher than the assessment that is payable to the Government. It may be that such jenmis may not be entitled to claim any amount by way of land price. They would only be entitled to claim as customary rent some amount which may be higher than the assessment levied by the Government. At any rate, if a third party was the person concerned in this case and not the Government, it would have been enough for the plaintiff to say that he was ready and willing to pay the customary rent and in that case there would have been no necessity to prove that he was willing also to pay the land price. But in the case of the Government, as is usual, the customary rent takes the form of a lump sum which is called the land price and an annual payment which is termed land assessment. The distinction is no doubt a very nice one; but in this case the whole question seems to have been fought out on the footing that what was asked by the Government through its officers was really equivalent to the customary rent. On other points, I see no reason to differ from the Subordinate Judge that really the plaintiff was willing to pay the price and the assessment or in the words of the Act that he answers the description in section 3 of a person who, with the *bona fide* intention of attorning and paying the customary rent, brought the land under cultivation.

The second appeal fails and is dismissed with costs. Time for payment of costs: two months. (No leave).

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CLARK.

S. S. Vasan *alias* T. S. Srinivasan .. *Petitioner.**

Newsprint Control Order (1941), *clause* 3 (6) *and Defence of India Rules* (1939), *rule* 81 (4)—*Use of paper other than newsprint for production of annual supplement to a weekly—How far an offence.*

The proprietor and editor of a weekly was prosecuted for an offence under rule 81 (4) of the Defence of India Rules read with clause 3 (6) of the Newsprint Control Order, 1941, for using paper other than newsprint for the production of an annual supplement issued at Deepavali in the year 1944.

Sub-clause (6) of section 3 of the Newsprint Control Order prohibits the proprietor of a newspaper from using in the printing of his "newspaper" any kind of paper other than newsprint. It was contended for the prosecution that the explanation to sub-clause (5) which includes a supplement or annual edition in the definition of a "newspaper" was applicable to sub-clause (6) also and therefore the supplement was a "newspaper."

Held, the supplement issued on the occasion of an annual festival whilst it may well have contained comments on the news for the past year cannot ordinarily be regarded as a newspaper on that account. Nor does the supplement fall within the definition of a "newspaper" in the Newspaper Control Order, 1944, as it was not a "periodical publication printed on newsprint." In the absence of an explanation to sub-clause (6) of clause 3 of the Newsprint Control Order similar to the one to sub-clause (5) the supplement cannot be regarded as a "newspaper" so as to make the use of paper other than newsprint in producing it an offence.

Petition under section 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Third Presidency Magistrate, Egmore, of the Court of the Presidency Magistrates, Egmore, Madras, dated 29th March, 1945, in C. C. No. 294 of 1945.

V. C. Gopalaratnam and *R. T. Sundararajan* for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court made the following

ORDER.—The petitioner is the proprietor and editor of Anandavikatan, a Tamil weekly. He has been prosecuted and convicted under rule 81 (4) of the Defence of India Rules read with clause 3 (6) of the Newsprint Control Order of 1941. The case for the prosecution was that the petitioner had used paper other

---

* Crl. R.C. No. 356 of 1945. (Crl. R. P. No. 332 of 1945). 26th June, 1945.

than newsprint for the production of an annual supplement to Anandavikatan issued by him at Deepavali in the year 1944.

Sub-clauses 1 to 5 of clause 3 of the Newsprint Control Order, 1941, impose restrictions on the sale and purchase of newsprint. It is only to be sold to and purchased by proprietors of newspapers. Sub-clause (5) prohibits the proprietor of a newspaper or of a newspaper press from using newsprint for any purpose other than the printing of newspapers. Sub-clause (6) prohibits the proprietor of a newspaper from using in the printing of his newspaper any kind of paper other than newsprint.

Sub-clauses (5) and (6) are as follows:

"(5) No proprietor of a newspaper or of a newspaper press shall use newsprint for any purpose other than the printing of newspapers except under an Open General Permit issued by the Central Government or under a permit in Form II granted by the Central Government or by an Officer authorised by the Central Government in this behalf.

Explanation.—In this sub-clause 'newspaper' includes any supplement or annual edition of a newspaper, but does not include a poster.

(6) No proprietor of a newspaper to whom a permit to purchase or to use newsprint has been issued shall use in the printing of the newspaper any kind of paper other than newsprint except with the permission in writing of the Central Government."

The whole question at issue in this prosecution is whether the supplement issued by the petitioner at Deepavali in 1944 is properly to be regarded as a "newspaper" for the purpose of sub-clause (6) of clause 3 of the Order. On behalf of the Government it is urged that "newspaper" ordinarily includes a supplement and that the explanation to sub-clause (5) must be regarded as having been inserted *ex abundanti cautela*. On this view, the meaning to be given to the word "newspaper" in sub-clause (6) and sub-clause (5) is the same. Further, reference is made to the definition of "newspaper" in section 1 of the press and Registration of Books Act, Act XXV of 1867. Reference is also made to the definition of "newspaper" in the Newspaper Control Order, 1944. I do not consider that either of these definitions of "newspaper" would ordinarily include a supplement. Whether it would be included under the definition in the Act of 1867 depends on whether the supplement contains public news or comments on public news. The supplement in this case was issued on the occasion of an annual festival, and whilst it may well have contained comments on the news for the past year, I do not consider that it could ordinarily be regarded as "newspaper" on that account.

As regards the definition in the Newspaper Control Order, 1944, it is, I think, quite clear that the supplement in the present case could not fall within that definition. Admittedly, as is shown by Exs. I and II in this case, the petitioner before publishing the supplement addressed the Government stating his intention to issue the supplement printed on "glaze paper, real and imitation art paper," and asking that he might be permitted to exceed his quota of 30 per cent. of the normal amount of paper used. That application was refused. I may state here that it is not suggested before me that the petitioner in issuing this supplement exceeded the 30 per cent. quota allowed to him. This quota is in respect of paper other than newsprint. But these facts make it quite clear that the supplement was not intended to be a "newspaper" within the definition of that term in the Newspaper Control Order, 1944, for it was not a "periodical publication printed on newsprint."

Accordingly I am unable to accept the contention that the expression "newspaper" is to be regarded ordinarily as including a supplement. The question then arises whether it can properly be regarded as having that meaning under sub-clause (6) of clause 3 of the Order of 1941. If it can, then the petitioner was properly convicted for having used paper other than newsprint for the purpose of producing his supplement. If it cannot, then his conviction must necessarily fall. It has been pointed out that sub-clause (6) was added in 1944, that is, three years after the issue of the Order. On this fact being pointed out, I asked whether it was suggested that the failure to add an explanation to sub-clause (6) like that following sub-clause (5) was a mistake; but this suggestion was not accepted. Clearly it could not be accepted by the Government if they wish to succeed in this appeal. It has many times been laid down that the Court will not supply even an obvious

omission if to do so would render an accused person liable to conviction.—*Maxwell* on Interpretation of Statutes, Eighth edition, page 239.

It seems clear to me that the addition of the explanation to sub-clause (5) and the omission of that explanation to sub-clause (6) are both intelligible and proper. As I have earlier stated, sub-clause (5) prohibits the proprietor of a newspaper or of a newspaper press from using newsprint for purposes other than the production of newspaper. It is significant that the prohibition operates against the proprietor both of a newspaper and of a newspaper press. The proprietor of a newspaper press as such does not appear to be entitled to obtain newsprint. It is only the proprietor of a newspaper who can obtain newsprint but he may in many cases hand it over to the proprietor of a newspaper press for the purpose of printing, and both are brought within the prohibition of sub-clause (5). It must have appeared to those framing this order and its subsequent amendments that it might in some cases be convenient to print the supplement to a newspaper on newsprint. On that account it would necessarily have been unsuitable to prohibit the person concerned from using newsprint for the purpose of printing a supplement. In my view the explanation to sub-clause (5) is by way of exception or extension to meet that possibility. The need for such exception or extension is obviously not present in sub-clause (6) which imposes a prohibition on the use of any other paper than newsprint for the production of newspaper. As I have said, it may well be that newsprint might be used for a supplement but equally it might not be. It might in many cases be convenient and desirable—as it would appear to have been the case here—to produce an annual supplement on paper other than newsprint, for example art paper or glaze paper. That being so, the explanation would necessarily be unsuitable in connection with sub-clause (6).

For these reasons, I am satisfied that there has been no offence committed by the petitioner and that his conviction cannot stand. Accordingly the conviction will be quashed and the fine paid will be returned to the petitioner. The petition is accordingly allowed.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

V. Pattabi Chetti .. *Petitioner.**

The Madras Prevention of Adulteration Act (III of 1918), section 6-A, sub-section (2)—Purchase of butter for use—Butter not used but sold to a dealer with a warranty that the butter was pure and unadulterated—Vendor having no reason to believe that these statements and descriptions were true if guilty of offence under section 6-A, sub-section (2).

Where the petitioner purchased butter for a festival in his house and not having used it sold it to a dealer with a warranty that the butter was pure and unadulterated and that it was up to the specifications required by the Madras Prevention of Adulteration Act,

Held, the petitioner might have thought that the butter would be unadulterated but it could be said that he had reason to believe that it was unadulterated since he had himself no knowledge of the butter which justified him in saying either that it was or was not adulterated and as such he was guilty of the offence punishable under section 6-A, sub-section (2) of the Act.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate, Egmore, Madras, dated 12th September, 1944, and passed in M. C. No. 302 of 1944.

S. A. Raja for Petitioner.

The Crown Prosecutor (*P. Govinda Menon*) for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted by the Chief Presidency Magistrate of an offence punishable under sub-section (2) of section 6-A of the Madras Prevention of Adulteration Act and has been sentenced to pay a fine of Rs. 50 or to undergo simple imprisonment for one month in default.

---

* Crl. R.C. No. 44 of 1945. 5th March, 1945.
(Crl. R. P. No. 43 of 1945).

There can be no doubt that the conviction is correct. The petitioner had purchased two tins of butter each 12 visses in weight for the purpose of some festival in his house. The tins of butter, however, were not used and he sold to a dealer, P. W. 2. When he sold them and that is the basis of the charge—he gave a warranty that the butter was pure and unadulterated and that it was up to the specifications required by the Madras Prevention of Adulteration Act. Sub-section (2) of section 6-A of the Madras Prevention of Adulteration Act provides that, "every person, who, in respect of an article of food sold by him whether as principal or as agent, gives to the purchaser a false warranty in writing shall, unless he proves to the satisfaction of the Court that when he gave the warranty he had reason to believe that the statements or descriptions contained therein were true, be punished with fine, etc." The butter sold to P. W. 2 was found on analysis to contain 22.5 per cent. of water whereas the maximum percentage of water permitted is 20 per cent. It is not disputed therefore that the warranty which was given by the petitioner was false. But it is argued that as he was a private person who had merely sold butter because it had turned out not to be wanted for the festival for which it was purchased and as the butter to his knowledge had been purchased from a reputable firm, he had within the meaning of sub-section (2) of section 6-A reason to believe that the statements or descriptions which he gave in his warranty in writing were true. In my opinion, it is not possible to accept this argument. The petitioner may have thought that the butter would be unadulterated, but it cannot be said that he had reason to believe that it was unadulterated since it is clear that he had himself no knowledge of the butter which justified him in saying either that it was or was not adulterated.

The conviction is therefore correct and in passing the sentence of fine only, the Chief Presidency Magistrate has taken into account the fact that in all probability the petitioner acted foolishly rather than criminally in giving the warranty which is the foundation of this case. The petition is dismissed.

V.P.S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Gazula Anandappa .. *Petitioner.**

Madras Civil Courts Act (III of 1873), section 13—Appeal properly lying to District Court—Court closed for vacation—Appeal preferred to High Court—Maintainability—Need for amending Act—Letters Patent, clause 16.

Clause 16 of the Letters Patent does not override the provisions of the Madras Civil Courts Act. The opening words of the clause "And we do further ordain that the said High Court of Judicature at Madras shall be a Court of Appeal from the Civil Courts of the Presidency of Madras and from all other Courts subject to its superintendence" are merely declaratory and do not govern the actual appellate jurisdiction of the Court. In deciding what appeals the High Court can receive and decide it must have regard to the "laws and regulations" in force, which includes the Madras Civil Courts Act. The latter Act in effect prohibits an appeal being filed in the High Court, where the appeal properly lies to the District Court. It is not therefore open to a judge of the High Court to pass an order directing an appeal which properly lies to the District Court to be received by the High Court for the reason that at that time the Distrit Court was closed for the summer vacation, and then transmit the same to the District Court after the re-opening and meanwhile pass interim orders in the appeal.

Decision of Ramesam, J., in C. M. Ps. Nos. 2774 and 2840 of 1933 disapproved.

Need for amending section 13 of the Madras Civil Courts Act so as to provide for the High Court entertaining such appeals pointed out.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to receive the appeal sought to be preferred to the District Court, Anantapur, against the order of the Court of the District Munsiff, Gooty, dated 14th April, 1945, in E. A. No. 222 of 1945 in E. P. No. 191 of 1945 in O. S. No. 657 of 1934, and retransmit it to the District Court, Anantapur, after passing the necessary orders.

Ch. Raghava Rao and *A. Gopalacharlu* for Petitioner.

---

* S. R. No. 13996 of 1945. 25th April, 1945.

The Order of the Court was made by

The Chief Justice.—The application before the Court is for an order directing an appeal which lies to the District Court of Anantapur to be received by this Court and transmitted to the District Court on its reopening after the summer vacation, the object being to obtain an interim order from this Court. The application is in accordance with a practice which existed in this Court from the year 1933 until last year. The practice was based on an unreported judgment of Ramesam, J. (C. M. Ps. Nos. 2774 and 2840 of 1933). In an order dated the 9th June, 1944, also unreported (C. M. P. No. 2513 of 1944) Byers, J., disagreed with the judgment of Ramesam, J., and held that an appeal which lay to a Court subordinate to this Court could not be received by this Court on the ground that the proper Court was closed for the vacation. The present application has been placed before this Bench in order that the conflict may be decided.

Section 13 of the Madars Civil Courts Act, 1873, states that regular or special appeals shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court and that appeals from the decrees and orders of Subordinate Judges and District Munsiffs shall, when they are allowed by law, lie to the District Court, except when the amount or value of the subject-matter of the suit exceeds rupees five thousand, in which case the appeal shall lie to the High Court, provided that whenever a Subordinate Judge's Court is established in a District at a place remote from the station of the District Court, the High Court may, with the previous sanction of the Provincial Government, direct that appeals from the decrees or orders of the District Munsiffs within the local limits of the jurisdiction of the Subordinate Judge be preferred in the Court of the latter.

Clause 16 of the Letters Patent says :

"And we do further ordain that the said High Court of Judicature at Madras shall be a Court of Appeal from the Civil Courts of the Presidency of Madras and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force."

In holding that this Court has jurisdiction to receive an appeal which should be filed in a Court subordinate to it when that Court is closed for the vacation, Ramesam, J., read the first part of clause 16 as being divorced entirely from its second part. Byers, J., considered that this was wrong and that the governing words of the clause are the words "in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations, now in force." We consider that the opinion of Byers, J., is to be preferred. In fact we regard Ramesam J.'s construction as doing grave violence to the wording of the clause.

The Madras Civil Courts Act in effect prohibits an appeal of the nature of the one now sought to be filed in this Court from being filed here. It expressly provides that it shall be filed in the District Court. The appellate Court having jurisdiction in this matter is the District Court of Anantapur and the appeal is in fact headed "In the Court of the District Judge, Anantapur." The petitioner wants this Court to accept it and pass an interim order as he cannot get an interim order from the District Judge on account of the District Court being closed.

Clause 16 of the Letters Patent does not override the provisions of the Madras Civil Courts Act. The opening words of the clause "And we do further ordain that the said High Court of Judicature at Madras shall be a Court of Appeal from the Civil Courts of the Presidency of Madras and from all other Courts subject to its superintendence" are merely declaratory and do not govern the actual appellate jurisdiction of the Court. In deciding what appeals this Court can receive and decide it must have regard to the "laws and regulations" in force, which in this case means the Madras Civil Courts Act. The course which Ramesam, J., decided on has the merit of convenience, but it is not in accordance with law and therefore his judgment cannot be followed.

The facts of the present case certainly indicate the necessity for an amendment of the Madras Civil Courts Act giving the High Court power to receive appeals when a District Court or Subordinate Court, as the case may be, is closed for the vacation.

The High Court is never completely closed as Courts subordinate to it are. There is always one, and in the long vacation of the High Court, two judges who are available to deal with urgent matters. The course suggested by Ramesam, J., could be legalised by a simple amendment of section 13 of the Madras Civil Courts Act and such an amendment should obviously be made without delay.

In the present case the petitioner wishes to appeal against an order passed by the District Munsiff of Gooty on the 14th April, 1945, refusing to allow an application under section 55 (4) of the Code of Civil Procedure. On the 12th April, 1945, the District Munsiff ordered the petitioner to be arrested in execution of a money decree. He was arrested two days later and then applied for his release on the ground that he intended to apply to be declared an insolvent. The District Munsiff dismissed the application as he did not consider it to be *bona fide*. The result is that the petitioner is now in a civil jail and he is unable to file an appeal against the order of the District Munsiff until the District Court of Anantapur re-opens on the 15th June, 1945. Other cases of an equally urgent nature are bound to arise. We cannot emphasise too strongly the urgency there is for a suitable statutory provision being made to meet cases like the present.

As the Court is powerless to act in the present case the application must be dismissed.

B.V.V. —— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Nalla Goundar .. *Appellant**

v.

Krishnaswami Naicker .. *Respondent.*

Registration Act (XVI of 1908), *sections* 73, 74 *and* 75—*Presentation of conveyance—Non-appearance of vendor—Requirements of section* 145 (2), *Madras Estates Land Act, not complied with—Refusal to register—Legality.*

The appellant presented to the Sub-Registrar a conveyance of immoveable property for registration. The respondent vendor did not attend at the office of the Sub-Registrar, when he was required to do so. The Sub-Registrar regarded his absence as a denial of execution and consequently refused to register the document. Thereupon the appellant appealed to the Registrar under section 73 of the Registration Act. Without inquiring whether the vendor had executed the deed the Registrar refused to register it because the respondent had not complied with the requirements of section 145 (2) of the Madras Estates Land Act. The appellant then filed a suit under section 77 of the Registration Act.

Held, that the Registrar should have registered the document and that the non-compliance with the requirements of the Madras Estates Land Act was not a valid ground for refusing registration.

Clause (*b*) of section 74 of the Registration Act has reference only to the requirements of the Registration Act or of any statutory provision which the legislature has said shall be regarded as being supplemental to the Registration Act.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Horwill, J., dated 17th November, 1944, and passed in S. A. No. 135 of 1944, preferred to the High Court against the decree of the Court of the Subordinate Judge, Dindigul, in A. S. No. 77 of 1942 (O. S. No. 7 of 1942, District Munsiff Court, Dindigul).

A. C. Sampath Aiyangar for Appellant.

S. Panchapakesa Sastri and *M. R. Narayanaswami* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—In this appeal the Court is called upon to construe clause (*b*) of section 74 of the Indian Registration Act.

The appellant presented to the Sub-Registrar a conveyance of immoveable property for registration. The vendor (the respondent in this appeal) did not attend at the office of the Sub-Registrar when he was required to do so for the purpose of the registration ; and the Sub-Registrar regarded his absence as a denial of

* L. P. A. No. 7 of 1945. 4th April, 1945.

execution. Consequently he refused to register the document. Thereupon the appellant appealed to the Registrar under section 73 of the Act. Without inquiring whether the vendor had executed the deed the Registrar refused to register it because the respondent had not complied with the requirements of section 145 (2) of the Madras Estates Land Act. He considered that compliance with the provision of law contained therein was necessary before the vendee was entitled to have the document registered.

This resulted in a suit being filed by the appellant under section 77 in the Court of the District Munsiff of Dindigul. The District Munsiff agreed with the Registrar and dismissed the suit. The appellant appealed to the Court of the Subordinate Judge of Dindigul. The Subordinate Judge held that the Registrar should have registered the document. The respondent then appealed to this Court. His appeal was heard by Horwill, J., who allowed it, as he agreed with the opinion of the District Munsiff. The present appeal is from the judgment of the learned Judge under clause 15 of the Letters Patent.

Section 73 of the Registration Act provides for an application to the Registrar, if the Sub-Registrar refuses to register a document. Section 74 says :

"In such case, and also where such denial as aforesaid is made before a Registrar in respect of a document presented for registration to him, the Registrar shall, as soon as conveniently may be, enquire—(*a*) whether the document has been executed ; (*b*) whether the requirements of the law for the time being in force have been complied with on the part of the applicant or person presenting the document for registration, as the case may be, so as to entitle the document to registration."

Section 75 relates to the order of the Registrar and the procedure to be followed thereon.

Sub-section (2) of section 145 of the Madras Estates Land Act says :

"Where a holding or any portion thereof is transferred by the act of a ryot, the landholder on receiving notice thereof in writing from the transferor and the transferee shall recognise the transfer. Any person presenting for registration any document transferring a holding or any portion thereof shall present therewith a notice in writing signed by the transferor and transferee, and addressed to the landholder asking for recognition of the transfer and shall also pay to the registering officer such fee as the Provincial Government may prescribe for the transmission of such notice to the landholder. The landholder shall recognise the transfer on receipt of the said notice."

Mr. Justice Horwill held that the words "whether the requirements of the law for the time being in force have been complied with" in clause (*b*) of section 74 of the Registration Act meant the requirements of any law which had reference to registration. He read the second clause of sub-section (2) of section 145 of the Madras Estates Land Act as being a law which the Registrar was bound to have regard to when a document was presented to him for registration by a vendee of land held by a ryot. The vendee in this case was a ryot and the land conveyed was ryoti land within the meaning of the Madras Estates Land Act.

For the appellant it is said that clause (*b*) of section 74 of the Registration Act has reference only to the requirements of the Registration Act or of any statutory provision which the Legislature has said shall be regarded as being supplemental to the Registration Act. An example of this is to be found in section 4 of the Transfer of Property Act. The second paragraph of that section says that section 54, paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Registration Act.

In our judgment the appellant's contention is well founded. The requirements of the law for the time being in force must be the requirements of the law relating to registration which entitle the Registrar to refuse registration if not complied with. The Act contains provisions with regard to the time of presentation for registration, the proper office to which a document must be submitted for registration and the persons who are entitled to present it for registration.

The question now before us was considered by the Calcutta High Court in *W. W. Broucke* v. *Rajah Saheb Mohan Bikram Shah*[1] and the opinion there expressed was that the requirements of the law meant the requirements of the Registration Act.

1. (1909) 14 C.W.N. 12.

Now, what is the meaning to be attached to the provision in sub-section (2) of section 145 of the Madras Estates Land Act which requires the transferee of a ryoti land to produce before the Registrar a notice in writing signed by the transferor and the transferee? In answering the question it must be borne in mind that this provision was inserted in order to help the transferee to get ready recognition of the transfer by the landholder.

Sub-section (6) (*a*) of section 145 states that where the transferor or the transferee fails to join the other in applying to the landholder for recognition of the transfer, the transferee or the transferor, or where a dispute arises as to the person or persons on whom the holding or portion thereof has devolved, a person claiming by devolution the holding or portion, may apply to the Collector for an order certifying the transfer or the devolution as the case may be. Clause (*b*) states that the Collector, after giving notice to the transferor or transferee or other persons interested and after making such inquiry as he thinks fit as to the fact and validity of the transfer or as to the person or persons on whom the holding or portion has devolved, may pass an order certifying the transfer or devolution as the case may be. On the production of a certified copy of such an order the landholder shall be bound to recognise the transfer or the devolution.

The deciding of an application filed under sub-section (6) would take time and it might very well happen that the decision would be given after the four months allowed for registration had expired. The transferee cannot compel the transferor to sign the notice contemplated by the second paragraph of section 145. When the transferor refuses, the only course open to the transferee is action under sub-section (6).

In our opinion the provision of law in that paragraph does not entitle the Registrar to refuse registration. If the Legislature had intended that to be its effect, it would have made the provision a supplemental provision of the Registration Act, as it did in the case of the Transfer of Property Act. We hold that the Subordinate Judge rightly decided the case. Consequently the appeal is allowed.

This means that the Registrar must register the document if it has been executed by the respondent. It has been admitted before us that he did in fact execute it, Therefore there will be a direction to the Registrar to register it on re-presentation. The conveyance is in Court and it will be returned to the appellant.

The appellant is entitled to his costs throughout.

(This appeal coming on to be mentioned, the Court made the following order):—

When this appeal was being heard learned counsel were not aware that the conveyance had been registered between the date of the judgment of the Subordinate Judge and the presentation of the appeal to this Court. They have since ascertained that the document was duly registered. In these circumstances there will be no need for its re-presentation to the Registrar.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Valappil Cheru Moidin's son Moidin Kutti .. *Appellant**

v.

Thekkumcheri Narayanan Unni Moopil Nayar .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 19—Compromise decrees—Scaling down—Principles.

In a suit filed in 1932 for Rs. 3,000 due on a mortgage executed for Rs. 1,600 in 1922 a compromise decree was passed on 21st July, 1933, providing that the plaintiff would give up the whole amount of the suit claim and Court costs except for Rs. 2,500. If the defendant paid before a certain date the plaintiff would give up a further sum of Rs. 500. Failing that, the whole amount of Rs. 2,500 would be realised by the sale of the properties in the plaint schedule. On an application to scale down the compromise decree,

Held, that it is incumbent upon the debtor to prove the extent to which interest is available for cancellation and the extent to which the compromise figure can be deemed to be a renewal of the

* A. A. A. O. No. 247 of 1944. 10th April, 1945.

antecedent liability. In the absence of any waiver by the mortgagee of his claim for costs, the judgment-debtors cannot say that the compromise figure is a renewal of the antecedent liability to the extent of the amount of costs (found to be about Rs. 500). The balance of the amount decreed must necessarily have been made up of the principal and interest of the mortgage debt and the debtor is entitled to the scaling down and amendment of the decree so as to provide for the payment of Rs. 1,600 with interest thereon at 5 per cent. from 1st October, 1937, and for Rs. 500 being the amount of costs with interest thereon at 5 per cent. from the date of the decree 21st July, 1933 to 22nd March, 1938, the date of the commencement of the Act and thereafter at 6 per cent.

Judgment in A. A. O. No. 491 of 1939 and C. R. P. No. 2316 of 1939, applied. Judgment in A. S. No. 235 of 1941, distinguished.

Appeal against the order of the District Court of South Malabar dated the 10th day of January, 1944, and made in A. S. No. 221 of 1943, preferred against the order of the Court of the District Munsiff of Tirur dated 12th day of July, 1943, and made in E. A. No. 752 of 1942, in O. S. No. 228 of 1932.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of an application to scale down a compromise decree. The decree arose out of a suit for Rs. 3,000 due on a mortgage for Rs. 1,600. The compromise provided that the plaintiff would give up the whole amount of the suit claim and Court costs except for Rs. 2,500. If the defendants paid before a certain date the plaintiff would give up a further sum of Rs. 500. Failing that, the whole amount of Rs. 2,500 would be realised by the sale of the properties in the plaint schedule. The first defendant gave up all his contentions including any claim for costs. On this decree the trial Court held that there was a simple renewal of the amount claimed on the mortgage by means of the compromise and scaled down the debt to Rs. 1,600, which was the principal of the mortgage. The lower appellate Court applying the decision in *Subbarayudu* v. *Sriramulu*[1] has held that the compromise is one in respect of which it is impossible to say how much of the amount decreed represents the antecedent debt and that therefore the decree is not susceptible of being scaled down under section 8 of Madras Act IV of 1938 though the mortgage was one of 1922. The decision quoted is however concerned with facts decidedly more complicated than those of the present case.

There is a good deal of case-law on the subject of the scaling down of compromise decrees, and its application is not made easier from the fact that two important decisions of the Bench dealing with cases under Act IV of 1938 have not apparently been reported. After the early decisions in *Ramamurthi* v. *Sitaramayya*[2] and *Kannan Nambiar* v. *Subramania Pattar*[3] in which the principle was laid down that a compromise decree could be scaled down as a renewal of the antecedent liability if the facts made it possible to show to what extent the antecedent liability with interest thereon made up the decree, there have been various other decisions. The decision in *Narayanan Chettiar* v. *Veeru Gounder*[4] when dealing with the appropriation of payments towards a compromise decree deprecated the practice of taxing the costs at the time when the decree was scaled down for the purpose of appropriating the payments towards the decree with reference to the proviso to section 19; but the Court in that case was not concerned with the question whether the amount of the costs could be ascertained for the purpose of finding out to what extent the compromise was a renewal of the original debt. This was pointed out by a decision in A. S. No. 235 of 1941 where the Bench held that the circumstances established in that case that the effect of the compromise was that the plaintiff gave up the claim to costs and consented to receive a lump sum in discharge of the pre-existing liability, and it was held that the whole of the amount decreed could be treated as a renewal of that antecedent liability. There is a further unreported decision which approximates very closely to the present facts. This is the judgment in A. A. O. No. 491 of 1939 and C. R. P. No. 2316 of 1939 where the suit on a promissory note resulted

1. (1943) 2 M.L.J. 367.
2. (1940) 2 M.L.J. 293.
3. (1940) 2 M.L.J. 927.
4. (1941) 2 M.L.J. 658.

in a compromise which provided for the payment of a lump sum of Rs. 11,011-6-6 towards the suit amount with costs and subsequent interest. It was conceded that the costs of this suit would be Rs. 1,312-8-6. On these facts it was decided that since the decree includes costs, on the assumption most favourable to the plaintiff it would seem to follow that the amount decreed less Rs. 1,312-8-6 must at least be a renewal of the previous indebtedness, and there was no complication by the compromise taking into consideration matters outside the suit, a decree was given on the basis that the rest of the amount due under the compromise must be treated as a renewal of the antecedent transactions and the decree for costs was left intact.

It seems to me that this last decision must govern the present case. Here the suit claim was entirely made up of the amount due on the antecedent mortgage for Rs. 1,600 executed in 1922. The parties agreed to pay and receive a lump sum in discharge of that claim and of the amount due for costs. There is nothing to show that the claim for costs was waived. It is incumbent upon the debtor to prove the extent to which interest is available for cancellation and the extent to which the compromise figure can be deemed to be a renewal of the antecedent liability. The trial Court has found that the costs of this suit would amount to approximately Rs. 500. To this extent therefore the judgment-debtors cannot say that the compromise figure is a renewal of the antecedent liability. The balance of the amount decreed must necessarily have been made up of the principal and interest of the mortgage debt. The appellant is therefore entitled to the amendment of the decree so as to provide for the payment of Rs. 1,600 with interest thereon at 5 per cent. from 1st October, 1937, and for Rs. 500 being the amount of costs with interest thereon at 5 per cent. from the date of the decree, 21st July, 1933 to 22nd March, 1938, the date of the commencement of the Act and thereafter at 6 per cent.

The appeal will be allowed, and the decree will be amended accordingly. The parties will pay and receive costs here and in the lower appellate Court proportionate to their failure and success.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Malladi Seetha Rama Sastri .. *Petitioner**

v.

Mallala Sobhanachalapathi Rao .. *Respondent.*

Madras House Rent Control Order (1941), *clause* 1, *sub-clause* (3) *and clause* 6 (*c*)—*Extension of order to whole of the Presidency—No retrospective effect to be given—Decree for arrears of agreed rent of dwelling house in the mofussil—Fixing of fair rent subsequent to decree—If and how far can supersede amount decreed.*

A suit for arrears of rent in respect of a dwelling house in the mofussil due for the period between 9th July, 1941, and 8th November, 1942, was decreed on the 15th October, 1943, on the basis of an agreed rent. Meanwhile the Madras House Rent Control Order was extended to the whole of the Presidency on the 17th March, 1942, and the tenant got the fair rent fixed in respect of his dwelling house on the 17th March, 1944. The rent so fixed was lower than that on the basis of which the suit was decreed. On a question as to the rate at which rent was to be computed as payable under the decree and the date from which such rate of rent was to be calculated.

Held, that the order of the Controller could have effect only from the date on which the control order became applicable to the area concerned, *i.e.*, 17th March, 1942, and that the plaintiff will be entitled to the agreed rent up to 17th March, 1942, and thereafter only to the fair rent as fixed by Controller on the 17th March, 1944.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bezwada, dated 31st March, 1944, and made in E. P. No. 307 of 1943, in S. C. S. No. 341 of 1942.

V. Subramanyam for Petitioner.

M. Appa Rao for Respondent.

---

* C. R. P. No. 1162 of 1944. 12th April, 1945.

The Court delivered the following

JUDGMENT.—This petition arises out of a suit to recover arrears of rent due by the defendant to the plaintiff in respect of a dwelling house in Bezwada. The plaintiff sued for rent payable between 9th July, 1941, and 8th November, 1942. Up to 25th July, 1941, the rent agreed was apparently Rs. 22 per month and thereafter Rs. 35. The suit was decreed on 15th October, 1943. In January, 1944, the defendant successfully prayed the Court to be allowed to pay in instalments. He paid three sums which in all amounted to Rs. 347.

On 17th March, 1944, an application was made to the Rent Controller, under the Madras House Rent Control Order, 1941, who fixed the fair rent of the property in question, and he fixed the rent at Rs. 21. Despite this, the plaintiff applied to the Court in execution of the balance due under the decree. The Court held that as the Rent Controller had fixed the fair rent his order must be taken as superseding the amount ordered by the decree. On the footing that Rs. 21 was only payable per month, the rent due in accordance with the Controller's order has been fully paid by the instalments referred to, and the decree was therefore satisfied.

Against that order the plaintiff appears in revision. He says that the defendant never objected in his written statement to the payment of the rent demanded and accepted the situation because after the decree he asked to be allowed to pay by instalments. Further he contended that the Controller's order fixing the fair rent was not retrospective or, at all events, did not extend beyond 17th March, 1942, when the Madras House Rent Control Order was applied to the mofussil.

The Control Order of 1941 came into force on 11th August, 1941, with regard to the City of Madras. Sub-clause (3) of clause (1) of the order says that the order shall extend to such areas within the Province of Madras as are notified by the Provincial Government. By Government Order it was later extended to various districts such as the Nilgiris and Madura and then, on the 17th March, 1942, it was extended to the rest of the Presidency. Clause 6 (*c*) provides that when the Controller has determined the fair rent of a house any sum in excess of such fair rent paid after the commencement of the order in respect of residence after the commencement of the order shall be refunded to the person by whom it was paid, or at the option of such person, otherwise adjusted. I read that sub-clause as meaning that after the application of the order to the district in which the house is situated, the clause shall apply and excess payments shall be refunded.

It has been urged for the defendant that the period during which the fair rent must be assumed to be applicable began on the date when the Control Order came into force in Madras, namely, 11th August, 1941. This contention, however, ignores the well-settled proposition of law that a statute which takes away the substantive rights of parties cannot have retrospective effect unless it is expressly so provided. In 1941 the order was limited to the City of Madras. Its effect was not extended to the mofussil until 17th March, 1942. In my opinion, therefore, the order of the Controller can have effect only from the date on which the order became applicable to the area concerned.

In the result, therefore, the plaintiff will be entitled to the agreed rent up to 17th March, 1942, and thereafter to the fair rent as fixed by the Controller on the 17th of March, 1944, with interest at the rate decreed in the suit. The matter is remitted to the lower Court for making the necessary computations and arriving at the correct sum due by the defendant taking into account the sums paid by him as stated. The petition is allowed with costs.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE HAPPELL.

Kathari Lakshmayya and others .. *Petitioners.**

Criminal Procedure Code (V of 1898), section 435—Power of Additional District Magistrate in revision to direct the accused to be committed—Enquiry under Chapter XVIII, Criminal Procedure Code—Magistrate deciding no case made out under section 307, Indian Penal Code and framing charges under sections 147, 323 and 325, Indian Penal Code—Additional District Magistrate competent to revise such order and direct commitment of accused to the Sessions on the charge of attempted murder.

A Magistrate enquiring under Chapter XVIII, Criminal Procedure Code, into a charge-sheet filed by the police decided by an order that no case had been made out of an offence under section 307, Indian Penal Code and framed charges under sections 147, 323 and 325, Indian Penal Code. On an application to revise the above order, the Additional District Magistrate directed the commitment of the accused to the Court of Sessions for trial under the charge of attempted murder as well as the other charges. On the question as to the competency of the Additional District Magistrate to entertain the revision and to order commitment to Sessions,

Held, that the order of the trying Magistrate and the charge which he framed showed that, as far as the charge under section 307, Indian Penal Code, was concerned, the accused was discharged and the Additional District Magistrate was therefore competent to set aside this order of discharge and direct the commitment of the accused to take their trial at the Sessions Court for this offence.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate of West Godavari at Ellore in C.R.P. No. 13 of 1944, dated 3rd July, 1944 (P. R. C. No. 9 of 1943, Stationary Sub-Magistrate's Court, Narasapur).

B. Jagannadha Das and *V. Parthasarathi* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

G. Gopalaswami and *G. Gopalakrishnan* for Complainant.

The Court made the following

ORDER.—The petition in this case is in substance to quash the commitment of the petitioners to take their trial at the Sessions Court by the Additional District Magistrate of Ellore. The charge-sheet filed by the police was enquired into by the Stationary Sub-Magistrate of Narasapur under the provisions of Chapter XVIII of the Code of Criminal Procedure. But when the prosecution evidence has been led and, after hearing the arguments of both parties, he decided that no case had been made out of an offence under section 307 and accordingly framed charges under sections 147, 323 and 325 of the Indian Penal Code and converted, as he says, the case to a calendar case triable by himself. The Stationary Sub-Magistrate embodied his decision to frame charges against the accused only under sections 147, 323 and 325 of the Indian Penal Code in an order which he passed on the 30th March, 1944. The order of the Additional District Magistrate now under consideration was passed on an application to him to revise the order of the Stationary Sub-Magistrate of the 30th March, 1944, and to direct commitment of the accused to the Court of Sessions for trial under the charge of attempted murder as well as the other charges.

The commitment was made under section 213 of the Code of Criminal Procedure and under section 215 a commitment made under section 213 can be quashed by the High Court only on a point of law. I propose, therefore, to say nothing of the merits of the case. The point of law taken is that the Additional District Magistrate was not competent to entertain the revision petition and to order commitment because the case before the Stationary Sub-Magistrate was still proceeding, and because as I understand the contention, the Sub-Magistrate might still elect to commit the case himself. In support of the contention I have been referred to the decision of the Bench of this Court in *Gandiappa Razu* v. *King-Emperor*[1]. This case has no application in so far as it is contended that it assists the petitioner. On the contrary, it is authority for the view that the Additional District Magistrate had jurisdiction to make the commitment of the accused which he did. The real question in *Gandiappa Razu* v. *King-Emperor*[1] was whether a prior order made on an application to the District Magistrate precluded the Sessions Judge, when an

*Crl. R. C. No. 618 of 1944. 22nd November, 1944.
(Crl. R. P. No. 585 of 1944.)

1. (1919) 38 M.L.J. 194 : I.L.R. 43 Mad. 330.

application was made to him, from directing the commitment of the accused. It was held that it did not, because the trial of the case was at a different stage when the application was made to the District Magistrate and when it was made to the Sessions Judge and because the District Magistrate had refused to consider the application on its merits. The learned Judges who decided *Gandiappa Razu* v. *King-Emperor*[1], however, were of the opinion that the commitment by the Sessions Judge was correct. In the case which was under consideration in *Gandiappa Razu* v. *King-Emperor*[1] the case had been taken on file under sections 147 and 304, but a charge had been framed under section 147 only. The accused, therefore, had in effect been discharged in respect of the offence under section 304, and from the judgment of Krishnan, J., in *Gandiappa Razu* v. *King-Emperor*[1], it appears that the Sessions Judge was held to have been competent to make the order which he did because the accused had been discharged in respect of the offence under section 304. In the present case, both the order passed by the Magistrate and the charge which he has framed show that, as far as the charge under section 307 is concerned, the accused was discharged. The Additional District Magistrate, in my opinion, was therefore competent to set aside this order of discharge and direct that the accused be committed to take their trial at the Sessions Court.

The petition is dismissed.

V.S. —————— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Gopalaswami Naick .. *Appellant**

v.

The Province of Madras through the District Collector of Ramnad at Madura, and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 33, rule 10—Interpretation—First charge for court-fees on the subject-matter of suit —Not confined only to that which party ordered to pay costs has recovered.

A suit filed *in forma pauperis* by four plaintiffs was, by consent, decreed to the effect that the second plaintiff should receive a certain portion of the properties in the suit and that the first plaintiff should pay the costs of the suit and the court-fee payable to Government. On the question as to whether the Government could realise the court-fee on the plaint out of the properties decreed to the second plaintiff,

Held, that Order 33, rule 10 was wide enough to allow a charge in favour of the Government on the properties received by the second plaintiff under the consent decree. It cannot be said that rule 10 of Order 33 means that the first charge referred to therein shall be only on the subject-matter of the suit which the party ordered to pay costs has recovered. The provision that there shall be a first charge on the subject-matter of the suit is a distinct provision.

Appeal under clause 15 of the Letters Patent against the order of the High Court dated 15th September, 1944, and made in A. A. O. No. 393 of 1943, preferred against the order of the Court of the Subordinate Judge, Ramnad, at Madura, dated 15th April, 1943, and made in I. A. No. 174 of 1942 in O. S. No. 36 of 1939.

T. R. Srinivasan for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant was the second defendant in a suit in the Court of the Subordinate Judge of Ramnad. There were four plaintiffs, the first plaintiff being the second plaintiff's mother and the third and fourth plaintiffs being her daughters. The suit was filed *in forma pauperis* for a declaration that a settlement dated the 27th February, 1938, purporting to have been executed by the first defendant in favour of the second defendant was not binding on the plaintiffs and for a partition of the property on the basis that the first plaintiff was the lawful wife of the first defendant and the second plaintiff his son. The third and fourth plaintiffs asked for a decree for maintenance and for marriage expenses. The first defendant denied that the first plaintiff was his wife and denied that the other

1. (1919) 38 M.L.J. 194 : I.L.R. 43 Mad. 330.

* L. P. A. No. 87 of 1944. 17th April, 1945.

plaintiffs were his children. During the pendency of the suit the first defendant died. The second defendant eventually agreed to the second plaintiff receiving 20 acres out of the properties in suit, and a decree was passed to this effect. The decree directed that the first plaintiff should pay the costs of the suit and the court-fee payable to Government.

The order for the payment of the court-fee led to an application being made to the Subordinate Judge for the appointment of a Commissioner to divide the properties referred to in the suit and to allot to the second plaintiff 20 acres so as to enable the Government to proceed against that area for the realisation of the court-fee on the plaint. The Subordinate Judge dismissed the application on the ground that the decree required the first plaintiff to pay the court-fee and that the second plaintiff had not succeeded on the merits. On appeal to this Court, Shahabuddin, J., reversed the decision of the Subordinate Judge. He held that Order 33, rule 10 of the Code of Civil Procedure was wide enough to allow a charge in favour of the Government on the 20 acres received by the second plaintiff under the consent decree. The appeal is from the judgment of the learned Judge.

We consider that Shahabuddin, J., correctly interpreted Order 33, rule 10. That rule states that, where the plaintiff succeeds in the suit, the amount of court-fees shall be recoverable by the Provincial Government from any party ordered by the decree to pay it, and shall be a first charge on the subject-matter of the suit. It is suggested that this means that the first charge shall be only on the subject-matter of the suit which the party ordered to pay costs has recovered; but this is not so. The provision that there shall be a first charge on the subject-matter of the suit is a distinct provision. The Court may direct the plaintiff to pay the amount, but in any event it shall be a first charge on the property recovered. Admittedly as a result of the decree the second plaintiff has received, or is entitled to receive, 20 acres of land, and the court-fee payable to Government is by reason of rule 10 made a charge thereon.

The learned Judge left open the question whether the Government was entitled to a charge in respect of the full amount of the court-fee, namely, Rs. 1,462-14-0 or Rs. 618-10-0, the court-fee payable on the claim of the second plaintiff and said that this question might be considered by the Court at the time of the execution. We adopt the same course.

The appeal is dismissed with costs.

V.S. —————— *Appeal dismissed.*

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD THANKERTON, LORD SIMONDS, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Lakshman Prasad .. *Appellant**

v.

John and others .. *Respondents.*

Companies Act (VII of 1913), *section* 230—*Receiver appointed in debenture-holders' action—Loan on agreement to hypothecate raised under orders of Court for paying off arrears of wages of labourers and workmen—Priority.*

Certain first mortgage debentures issued by a limited company which were in common form, were secured by a trust deed which contained (*a*) a specific charge on certain immoveable and other assets of the company, and (*b*) a floating charge on the rest of its property and undertaking. The company also obtained financial assistance from *X* under an agreement providing a lien for such advances on raw materials in the company's godowns and other materials products and property as therein specified.

In a suit by the trustees of the debenture trust to enforce their security a receiver was appointed of the property and undertaking of the company. As the wages of the labourers and workmen were in arrears they went on strike and the receiver with the Court's sanction raised money from *X* on a charge of the company's property to pay off the wages. The agreement provided "As regards these goods it has been agreed upon that as there is no opportunity for sufficient enquiry at this time, hence in future if these goods will be proved to be the property and to have been purchased or under the

*P. C. Appeal No. 62 of 1943. 1st March, 1945.

lien of *X* (as the financier) then within ten-days of the said decision, I shall hypothecate to *X* aforesaid to his satisfaction sufficient property." The goods having been found to be under lien to *X*,

Held, *X* is entitled to priority in respect of the amount lent under the agreement. As against the debenture-holders an agreement to hypothecate is as effectual as an actual hypothecation.

John v. *Suraj Bhan*, I.L.R. (1938) All. 869, reversed.

Sir T. Strangman and *S. P. Khambatta* for Appellant.

C. S. Rewcastle and *U. Sen Gupta* for Respondents.

Their Lordships' Judgment was delivered by

Lord Simonds.—These consolidated appeals from a decree of the High Court of Judicature at Allahabad* dated 3rd August, 1938, which varied a decree of the Subordinate Judge at Agra dated 27th April, 1931, raise the question whether the appellant Lakshman Prasad (who will be called "the appellant") is entitled as against the respondents, the holders of debentures issued by an Indian limited company known as Agra United Mills, Ltd., and herein called "the company," to any and what priority over such debentures in respect of moneys which had been borrowed from him by the receiver appointed in a suit brought by such respondents to enforce their security. The Subordinate Judge held the appellant entitled to priority in respect of all the property subject to the charge, whether fixed or floating, created in favour of the debentures: the High Court limited the priority to the property subject to the floating charge. The appellant seeks to restore the order of the Subordinate Judge, the respondents to deprive him of his priority even in respect of the property subject to the floating charge.

The company was formed in the year 1920 with a nominal capital of Rs. 150,00,000, of which Rs. 65,00,000 were issued, for the purpose of working certain cotton and other mills which had previously belonged to the respondents or some of them. In the same year, the company issued 200 first mortgage debentures of Rs. 25,000 each bearing interest at 8 per cent. per annum. These debentures, which were in common form, were secured by a trust deed dated 8th August, 1923, which contained (*a*) a specific charge on certain immoveable and other assets of the company, and (*b*) a floating charge on the rest of its property and undertaking. In and after the year 1925, the company also obtained financial assistance from the appellant's father, Rai Bahadur Seth Suraj Bhan (whose heir and legal representative he is), under the terms of an agreement dated 9th November, 1925. This agreement, which was of an elaborate character, provided (*inter alia*) for the lender having a lien for moneys advanced by him on raw materials in the company's godowns and other materials, products and property as therein specified.

In 1927 the trustees of the debenture trust deed filed a suit (No. 84 of 1927) in the Court of the Subordinate Judge at Agra to enforce this security and in that suit on 30th November, 1927, one P. N. Raina, was on the application of the plaintiff trustees appointed receiver of the property and undertaking of the company. The case was presented to the Judge, and was accepted by him, as one of grave urgency, in which the appointment of a receiver was necessary for the protection of the property. It was alleged that the company had not been able to pay its staff and mill-hands for at least three months and that the mill-hands had therefore gone on strike, creating a disturbance which threatened the safety of the company's property. On the folllowing day, 1st December, 1927, upon a report made by the receiver the Court made a further order in these terms:

"The mill-hands have to be paid and from the letter of the District Magistrate it appears that the mill-hands have been promised their dues, and if they do not get their salaries then there is every chance of a riot and disturbance at the mill-hands. The mills are about to file an appeal. In case Messrs. Suraj Bhan and Kunwar Ganesh Sinha decline to pay the money which they promised, then you can sell such properties which is admittedly theirs or raise money on such terms as you think proper. The plaintiffs should come forward to co-operate with you. The money which will be paid by Messrs. Suraj Bhan and Kunwar Ganesh Singh or any one else will confer on them the lien which the mill-hands have on the property which is in the mill-premises."

It appears that Messrs. Suraj Bhan and Kunwar Ganesh Sinha did "decline to pay the money which they promised," whatever their obligation may have been. The receiver was therefore by the order authorised to raise money on such terms

* I.L.R. (1938) All. 869.

as he might think proper. Their Lordships entertain no doubt that under this authority the receiver could validly raise money by a charge on the company's property ranking in front of the debentures. It is not to be supposed that a lender could be found to advance money on any other terms than that he should have priority for the sums advanced by him for the salvage of the property. Acting on the authority of this order the receiver on 4th December, 1927, entered into an agreement with the appellant's father which was in the following terms :

" I have been appointed Receiver by the Court of the Additional Sub-Judge Agra, in suit No. 84 of 1927—*Major A. John* v. *The Agra United Mill, Limited*, and under an order, dated 30th November, and 1st December, 1927, the Court has authorised me, the executant, to contract a sufficient amount of loan and pay off the salaries of the labourers, and to run the Mill so far as possible. Accordingly, I have made, Seth Suraj Bhan Rai Bahadur, who has been financier of the mill from before and has invested money in it, willing to advance to me at this time Rs. 31,000 in cash bearing interest at annas 12 per cent. per month, on promise of paying back the amount after six months, so that salaries of the employees and labourers may be paid and the said Seth Sahab may take away all the moveable property, such as bales of prepared yarn, grain, flour, maida (fine flour), cotton, bales, packing materials, waste and other goods under preparation, *i.e.*, under process, which lie within the limits of the mill and which are stated by the Seth Sahab to be owned and purchased by him. Accordingly the parties have come to an agreement. I, the executant, have received Rs. 31,000 in cash from Seth Suraj Bhan, Rai Bahadur, the proprietor of firm Seth Chunni Lal, resident and rais of Belanganj, Agra. As regards these goods it has been agreed upon that as there is no opportunity for sufficient enquiry at this time, hence in future if these goods will be proved to be the property and to have been purchased or under lien of Seth Sahab aforesaid, then within 10 days of the said decision I shall hypothecate to Seth Sahab aforesaid to his satisfaction, sufficient property worth at least Rs. 60,000. If these goods will not be proved to be the property or under lien to Seth Sahab aforesaid, then he (Seth Sahab aforesaid) will set-off the sum of Rs. 31,000 towards the price of the said goods and Seth Sahab shall have the same right and lien in respect of this amount of debt and only to that extent as the employees and labourers have in respect of these goods according to law and justice. The remaining goods aforesaid or the market value of the same, if any, shall after setting off this debt, be paid by Seth Sahab aforesaid to me, the executant, and shall be liable for the same. All these proceedings have been taken under the order of the Court of the Additional Subordinate Judge of Agra, hence there is no personal liability of me, the executant, in any way."

It is necessary to state this agreement in full since it appears to their Lordships that the rights of the parties depend upon a proper appreciation of its effect and that the High Court has in this respect fallen into error. It is not in dispute that the sum of Rs. 31,000 was duly paid to the receiver or that this sum was applied by him in the manner contemplated by the agreement or that the goods therein referred to were proved to be the property of the lender and were in due course removed by him. From these facts two consequences follow. In the first place, it is clear that that part of the agreement which begins with the words : " If these goods will not be proved to be the property or under lien to Seth Sahab " did not come into operation and therefore the question what " right or lien " the " employees or labourers " might have " in respect of these goods according to law and justice " does not arise. In the second place it is clear that the obligation contained in the immediately preceding sentence of the agreement did become effective and the receiver became bound to " hypothecate to Seth Sahab aforesaid to his satisfaction sufficient property worth at least Rs. 60,000."

In these circumstances, their Lordships consider that the judgment of the High Court proceeds upon a wrong basis. The terms of the agreement, by reference to which the learned Judges of that Court have determined the issue, may be assumed to be an infelicitous way of providing that the lender should be subrogated to the same rights of preferential payment as the relevant sections of the Indian Companies Act prescribe for labourers and workmen, and there is no reason to doubt the correctness of the conclusion to which the High Court has upon that basis come, that in a debenture-holders' action as in a winding up of the company this preferential right is limited to the property subject to a floating charge. But, as already pointed out, this is not the real question for decision. It is the earlier part of the agreement which became operative and the question is what is the right of the lender to whom the receiver has agreed to " hypothecate sufficient property worth at least Rs. 60,000." To this question there can be only one answer. The lender is entitled to a charge in priority to the debenture-holders. It has been

urged that the order does not expressly authorise the creation of a prior charge. That is true, but such priority is implicitly authorised. For, if it were not so the order would be stultified and the property could not be saved. It has been further urged that there was not in fact any hypothecation. This also appears to be true. But it cannot help the debenture-holders: against them an agreement to hypothecate is as effectual as an actual hypothecation. This is the construction to which the Subordinate Judge came and in their Lordships' opinion he was right. The decrees under review in this appeal were made not in the debenture-holders' suit, to which reference has been made, but in a fresh suit which the appellant commenced upon the directions given by the Subordinate Judge on his application to have his rights determined in that suit. All proper parties appear to have been before the Court and the result is the same.

Their Lordships are of opinion that the order of the High Court should be set aside and the order of the Subordinate Judge restored and that the respondents should pay the appellant his costs of these appeals and of the appeal to the High Court and will humbly advise His Majesty accordingly.

Solicitors for Appellant: *T. L. Wilson & Co.*

Solicitors for Respondents: *Douglas Grant & Dold.*

K. S. *Appeals allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Mahbub Shah .. *Appellant**

v.

The King-Emperor .. *Respondent.*

Penal Code (XLV of 1860), section 34—Construction—Scope and applicability—Common intention—Meaning.

Section 34 of the Indian Penal Code lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all." Under the section the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. Common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin, nevertheless the distinction is real and substantial, and if overlooked will result in miscarriage of justice. The inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case.

Phineas Quass for Appellant.

B. J. McKenna for Respondent.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal by special leave against a judgment of the High Court of Judicature at Lahore dated 14th March, 1944, confirming on appeal, the conviction of the appellant of the murder of one Allah Dad and the sentence of death passed on him by the Sessions Judge, Mianwali, on 20th December, 1943.

The appellant Mahbub Shah is aged 19. He has been convicted of murder under section 302 read with section 34 of the Indian Penal Code. He was also convicted of the attempted murder of one Hamidullah Khan and sentenced to seven years' rigorous imprisonment; but that conviction has not been brought before the Board.

The main question raised in this appeal is whether the appellant has been rightly convicted of murder upon the true construction of section 34 of the Indian Penal Code.

Section 34 runs as follows:

---

* P. C. Appeal No. 64 of 1944. 31st January, 1945.

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Along with the appellant, his cousin Ghulam Quasim Shah, aged 18, was also convicted under section 302/34 of the Indian Penal Code and sentenced to transportation for life. Ghulam was convicted under section 307/34 also and was sentenced to five years' rigorous imprisonment by the Sessions Judge but his convictions and sentences have been set aside by the High Court. The deceased Allah Dad died as the result of gunshot wounds inflicted on him. One Wali Shah, who is said to have fired the shot that killed the deceased, is a fugitive from justice and has not been so far arrested. His father Mohammad Hussain Shah, who was committed to the Sessions Court on a charge of abetment of murder, was acquitted by the Sessions Judge.

The following table given in the judgment of the High Court shows the relationship between the appellant and the other persons who are alleged to have been concerned in this crime.

	Mohammad Shah	
Mohammad Shariff Shah	Muhammad Hussain Shah	Abdulla Shah
Alam Shah.	Wali Shah (absconder).	Gulam Quasim Shah (accused)
Mahbub Shah (accused).		

The prosecution case as accepted by the High Court may be briefly stated: On 25th August, 1943, at sunrise, Allah Dad, deceased, with a few others left their village Khanda Kel by boat for cutting reeds growing on the banks of the Indus river. When they had travelled for about a mile downstream, they saw Mohammad Shah, father of Wali Shah (absconder) bathing on the bank of the river. On being told that they were going to collect reeds, he warned them against collecting reeds from land belonging to him. Ignoring his warning they collected about 16 bundles of reeds, and then started for the return journey. While the boat was being pulled upstream by means of a rope, Ghulam Quasim Shah, nephew of Mohammad Husain Shah—acquitted by the High Court—who was standing on the bank of the river asked Allah Dad to give him the reeds that had been collected from his uncle's land. He refused. What happened subsequently was spoken to by two boys Nur Hussain, P. W. 10, and Nur Muhammad P. W. 11, whose version of the story has been accepted as true by the High Court and summarised as follows:

"Quasim Shah then caught the rope and tried to snatch it away. He then pushed Allah Dad and gave a blow to Allah Dad with a small stick but it was warded off on the rope. Allah Dad then picked up the lari from the boat and struck Quasim Shah. Quasim Shah then shouted out for help and Wali Shah and Mahbub Shah came up. They had guns in their hands. When Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them and Wali Shah fired at Allah Dad who fell down dead and Mahbub Shah fired at Hamidullah, causing injuries to him"

(Lari is a bamboo pole for propelling the boat, about ten feet long and six inches thick).

On the above facts, the learned Judges of the High Court came to the conclusion that Ghulam Quasim was wrongly convicted of murder under section 302/34, Indian Penal Code on the following reasoning. Bhandari, J., with whom Teja Singh, J., concurred, first held that Ghulam Quasim had no common intention of killing any member of the complainant party when he went to the bank of the river in order to demand the bundles of reeds which had been collected from his uncle's lands. Then the learned Judge addressed himself to the question "whether a common intention" to commit the crime which was eventually committed by Mahbub Shah and Wali Shah came into being when Ghulam Quasim Shah shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns, and this he answered in the negative, holding that:

"so far as Quasim Shah was concerned he did no more than ask his companions to come to his assistance when he was knocked with a pole by the deceased"

and that

"he could not have been aware of the manner in which assistance was likely to be rendered to him or his friends were likely to shoot at and kill one man or injure another."

In the result, he was acquitted of all offences.

The learned Judge then proceeded to examine the case of the appellant and Wali Shah. He stated that the case of Mahbub Shah, who was armed with a single barrelled gun, and of Wali Shah, who had a double barrelled gun, however stood on a different footing. He distinguished their case on the following ground:

"As soon as they ran to the assistance of Ghulam Quasim Shah, they fired simultaneously in the direction of the complainants killing Allah Dad on the spot and causing injuries on the person of Hamidullah Khan. It is difficult to believe that when they fired the shots they did not have the common intention of killing one or more of the complainant party. If so, both of them are guilty of murder notwithstanding the fact that the fatal shot was fired by only one of them, namely, Wali Shah, absconder."

It will be observed that according to the learned Judge a common intention to commit the crime came into being when appellant and Wali Shah fired the shots.

Their Lordships will now proceed to consider whether the above reasoning is correct, and section 34 of the Indian Penal Code has been rightly applied to the facts of the case. Attention has already been drawn to the words of the section. As it originally stood, the section was in the following terms:

"When a criminal act is done by several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

In 1870, it was amended by the insertion of the words "in furtherance of the common intention of all" after the word "persons" and before the word "each," so as to make the object of the section clear. Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case.

On careful consideration, it appears to their Lordships that in the present case there was no evidence and there were no circumstances from which it might be inferred that the appellant must have been acting in concert with Wali Shah in pursuance of a concerted plan when he along with him rushed to the rescue of Ghulam Quasim. The exaggerated circumstances alleged by the prosecution to invoke the aid of section 34, Indian Penal Code, have been found against by the High Court who have acted solely on the evidence of P. W. 10 and P. W. 11. There was no evidence to indicate that Ghulam Quasim was aware that the complainant party had been cutting reeds from his uncle's lands, or that the appellant and Wali Shah had been kept behind the bush to come and help him when called upon to do so. The evidence shows that Wali Shah "happened to be out shooting game" and when he and the appellant heard Ghulam's shouts for help they came up with their guns; the former shot the deceased, killing him outright, and the appellant shot at Hamidullah Khan inflicting injuries on his person. Indeed, the High Court negatived the existence of a "common intention" at the commencement in the sense in which their Lordships have explained the term by stating—in considering the application of section 34, Indian Penal Code, to the case of Ghulam —what has been already quoted, *viz.*:

"that the sole point which requires consideration now is whether a common intention to commit the crime came into being when Ghulam shouted to his companions to come to his rescue and both of them emerged from behind the bushes and fired their respective guns."

Having answered the above question in the negative as regards Ghulam Quasim, the learned Judges thought, as Bhandhari, J., has expressly stated, that with respect to the appellant and Wali Shah, it must be held that the common intention of killing one or more of the members of the complainant party came into being later, when they fired the shots. Their Lordships cannot agree with this view. Their Lordships are prepared to accept that the appellant and Wali Shah had the same intention, *viz.*, the intention, to rescue Quasim if need be by using the guns and that in carrying out this intention the appellant picked out Hamidullah for dealing with him and Wali Shah, the deceased, but where is the evidence of common intention to commit the criminal act complained against, in furtherance of such intention? Their Lordships find none. Evidence falls far short of showing that the appellant and Wali Shah ever entered into a premeditated concert to bring about the murder of Allah Dad in carrying out their intention of rescuing Quasim Shah. Care must be taken not to confuse same or similar intention with common intention; the partition which divides "their bounds" is often very thin; nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice. In their Lordships' view, the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. That cannot be said about the inference sought to be deduced from the facts relied on by the High Court in distinguishing the case of the appellant from that of Ghulam Quasim.

Mr. McKenna, the learned Counsel for the Crown, besides supporting the judgment of the High Court on the grounds mentioned in it, called their Lordships' attention to the following additional circumstance in further support of it. Reference was made to the concluding portion of the evidence of P. Ws. 10 and 11, where it is stated that "when Allah Dad and Hamidullah tried to run away, Wali Shah and Mahbub Shah came in front of them . . ." and fired shots. This circumstance is stated more definitely in the evidence of P.W.6. He stated ". . we then tried to run away but Mahbub Shah and Wali Shah coming in front of us and prevented our escape" and fired shots. It was argued that the attempt of the appellant and Wali Shah to prevent the escape of the complainant party shows that they were actuated by a common intention to commit the crime, and from that moment the Court is entitled to infer a common intention to commit the crime even though there was no pre-concerted plan to shoot till then. This additional circumstance does not, in their Lordships' view, advance the prosecution case any further, and, moreover, the learned Judges of the High Court do not rely on it. In the circumstances, their Lordships are not satisfied that the appellant was rightly convicted of the offence of murder under section 302, Indian Penal Code, read with section 34. His conviction for murder and the sentence of death passed on him should, therefore, be quashed. In this view, the further question raised in the appeal whether, in the event of his conviction being confirmed, the sentence of death passed on him should not, having regard to the circumstances of the case and his age, be commuted to one of transportation for life does not arise for consideration.

For the reasons indicated above their Lordships have humbly advised His Majesty that the appellant having succeeded in his appeal, his appeal should be allowed and his conviction for murder and the sentence of death set aside.

Solicitors for Appellant: *Douglas Grant & Dold.*

Solicitors for the Crown: *Solicitor, India Office.*

V.S. *Appeal allowed and conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE PATANJALI SASTRI.

Rajayya Nandiar .. *Appellant**

v.

Laxmana Ayyar and another ... *Respondents.*

Madras Estates Land Act (I of 1908) Sections 3 (10) (b) (iv) Proviso, 6, 55, 185-A and 185-B—Private land—Purchase of land by landholder for arrears of rent and cash paid—Acquisition of kudivaram—Tenant being in possession for long period—Inference—Meaning of "retention of kudivaram."

The plaintiffs who were the tenants instituted the suits under section 55 of the Madras Estates Land Act to compel the defendants landlords to issue pattas on the footing that occupancy rights had passed to them. It appeared that the properties were acquired by the defendants predecessors-in-title in the course of several years by purchase from the other kudivaramdars partly in discharge of arrears of rent and mainly in lieu of cash consideration paid.

Held, that the lands so purchased ceased to form part of the estate and that they constituted private lands.

Conversion of ryoti land into private land may be by express grant or possibly by leasing them along with admitted ryoti lands under a single patta with terms which are inconsistent with the landlord's absolute rights in them. The mere fact that a tenant has been allowed to be in possession for a long period will not by itself amount to a conversion of private land into ryoti land, nor can it be taken to indicate that the landholder has not retained the kudivaram interest.

The expression "retention of kudivaram" must be understood to mean the retention of the right to cultivate which means that the landholder may, if he chooses, take back the land and cultivate it himself.

The proviso to Section 3 (10) (b) (iv) of the Madras Estates Land Act will apply only if the kudivaram was acquired by the landlord at a sale for arrears of rent. And the expression "at a sale for arrears of rent" contemplates a sale held by a Court or revenue officer acting under the powers conferred by law and not a private sale by the owner of the kudivaram.

Appeals against the decrees of the District Court of West Tanjore in A.S. No. 198 and 199 of 1942 respectively preferred against the decrees of the Court of the Sub-Collector of Kumbakonam in S. S. No. 137 of 1940 and 152 of 1940, respectively.

A. Swaminatha Aiyar for Appellant.

S. Panchapakesa Sastri, T. S. Venkatarama Aiyar and *M. S. Mahadeva Ayyar* for Respondents.

The Judgment of the Court was delivered by

Somayya, J.—The suits giving rise to these two second appeals were filed under section 55 of the Madras Estates Land Act to compel the defendants to issue pattas to the appellant who was the plaintiff in the trial Court. His suits were dismissed by both the lower Courts and hence the second appeals. The appellant's case is that Mahalinga Iyer who was the owner of a half share in the village of Kilayur leased certain lands to him and that he has been enjoying these lands as lessee for nearly 25 years before suit. He therefore acquired occupancy rights and as a ryot he filed the two suits under section 55 of the Act to compel the landholder to issue a patta to him.

The defence is that the appellant was not a ryot of the lands involved in these two suits and that further they are the private lands of the respondent. On both the points, the lower Courts held against the appellant. These suits were tried along with three other suits which gave rise to second appeals Nos. 971, 974 and 977 of 1944 which we have disposed of today. Considerable confusion has arisen by the fact that all the suits were tried together. The appellant supported the case of the plaintiffs in the other suits and was examined as P. W. 2. In his evidence he merely referred to Exs. M to Y-1 and stated that Ex. M was a letter written to him by Mahalinga Ayyar in 1931, that Ex. N was a similar letter of 1932, that Ex. O series five in number were of 1933, Exs. P and P-1 were of 1934, Ex. Q and Q-1 of 1935, Ex. R to R-4 of the year 1936, S to S-5 of 1937, T and T-1 of 1938, U to U-2 of 1939 and W and W-1 of the year 1940. Ex. Y and Y-1 are the suit notices that were given by the appellant one to Lakshmana Iyer and the other to one Srinivasa Iyer. Beyond the reference to these documents in the way just

* S.A. Nos. 975 and 976 of 1944. 20th March, 1945.

set out, the appellant as P.W. 2 merely stated that he has been in enjoyment of the suit lands as a lessee for 25 or 26 years. The trouble is that a mere perusal of these documents do not show that they refer to the lands in Kilayur and much less to the lands involved in these two suits. The appellant was admittedly the lessee of Mahalinga Iyer of lands situated in other villages. Mahalinga Iyer apparently owned certain lands in Umayalpuram and in some other villages. The appellant was a lessee of Mahalinga Iyer's lands in other villages as well. In fact Ex. S-2 shows that in respect of Umayalpuram lands held under Mahalinga Iyer the appellant had to pay a rent of 60 kalams of paddy. The appellant and his advisers seem to have overlooked the necessity of connecting these documents with the lands in suit which are situated in Kilayur. The lower Courts were not satisfied that these letters really refer to suit lands. If that conclusion is accepted there is an end of the appellant's case.

There is some force in the argument of Mr. Swaminatha Iyer that these documents were assumed by both the parties to refer to the suit lands. We prefer to proceed on the footing that they refer to the suit lands and in the view that we take of the other question it is really unnecessary to decide whether these letters refer to the suit lands. We are in agreement with the finding of the lower Courts that these lands are really private lands as defined by section 3 (10) (*b*) (*iv*) of the Madras Estates Land Act as amended by the later Acts. Under the Act as it stood in 1908, lands in which tenants did not get occupancy rights were dealt with in several sections and different tests were laid down in cases of different classes of estates. One class of estates under the Estates Land Act consists of whole inam villages which are not parts of zamindaries. Section 3 (2) (*d*) defines such estates as

"any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village".

Section 3 (10) defined 'private land' as meaning the domain or homefarm land of a landholder by whatever designation known such as kambhattam, khas, sir or pannai. Section 19 of the Act declared :

"Except as otherwise specially provided in this Act, the relations between a ryot and his tenants, or between a landholder and a tenant of his private land, and the rights of any other owners of land, are not regulated by the provisions of this Act".

Section 6 which conferred occupancy rights was confined to the case of ryoti lands in an estate. Leaving out unnecessary words section 6, clause (1) says that—

" every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land shall have a permanent right of occupancy"

and ryoti land was defined by section 3 thus :

"Ryoti land means cultivable land in an estate other than private land".

Therefore, if a certain land in an estate was private land, the person let into possession as a tenant of such land did not get occupancy rights. This provision is common to all the different classes of estates defined in section 3 (2). In respect of whole inam villages which were estates under section 3 (2) (*d*), the exception to section 8 of the Act provided that where before or after the commencement of this Act the kudivaram interest in any land comprised in an estate falling under section 3 (2) (*d*) was acquired by the inamdar such land shall cease to be part of the estate. In the case of villages which were estates under section 3 (2) (*d*) if the inamdar acquired the kudivaram interest in some lands whether before or after the commencement of the Act, those lands were thereafter not parts of the estate though they may be situated geographically within the ambit of the village. As is well known the mere fact that a certain land is within the geographical limits of the estate does not mean that it is part of the estate. In such lands therefore, the tenant did not get occupancy rights. Chapter 12 of the Act dealt with the private lands of a landholder. Section 185 of the Act laid down certain rules of evidence to enable Courts to determine whether any land was the private land of the landholder. It enacted that in determining whether any land was the private land of the landholder regard should be had to the local custom and to the question whether the

land was, before the first day of July 1898 specifically let as private land and to any other evidence that may be produced, but the land should be presumed not to be private land until the contrary was shown. A proviso was added that all land which was proved to have been cultivated as private land of the landholder himself by his own servants or by hired labour with his own or hired stock for twelve years immediately before the commencement of this Act should be deemed to be the landholder's private land.

Pausing here, if a particular land was shown to be the domain or homefarm land of the landholder known as kambhattam, khas, sir or pannai, it was at the absolute disposal of the landholder. Even if it was not shown to be such land if the landholder had cultivated the land himself by his own servants or by hired labour for twelve years immediately prior to the commencement of the Act, *i.e.*, prior to the first July, 1908, the lands should be deemed to be private land in which the tenants got no occupancy rights. In addition to these two categories, the legislature enacted in section 185 that if certain lands were let specifically as private land before the first July, 1898, that fact might be taken into consideration along with any other evidence. Regard was also to be had to the local custom. In the case of an estate under section 3 (2) (*d*), there was the further provision enacted in the exception to section 8 that where the inamdar acquired the kudivaram whether before or after the Act he was the absolute owner of those lands ; in fact those lands ceased to form part of the estate. We had thus to go to several sections to determine whether a tenant let into possession of a certain land was entitled to an occupancy right therein.

When the Act was amended piecemeal between 1934 and 1936, a more rational regrouping of the various sections was adopted and in the Act as it now stands, different kinds of lands in which the tenants do not have occupancy rights are all brought in under section 3, clause (10). Section 3 (10) consists of two clauses (*a*) and (*b*). Clause (*a*) deals with estates which fall under section 3 (2) (*a*), (*b*), (*c*) or (*e*) *i.e.*, estates which are not covered by section 3 (2) (*d*). In the case of these estates private land is defined by section 3 (10) (*a*) to mean the domain or homefarm land of the landholder by whatever designation known such as kambattam, khas, sir or pannai and to include all land which is proved to have been cultivated as private land of the landholder himself or by his own servants or by hired labour with his own hired stock for a continuous period of 12 years immediately before the commencement of the Act. This, it will be observed, is bringing a portion of the old section 185 into section 3 (10). Section 3 (10) (*b*) defines private land in the case of an estate falling within section 3 (2) (*d*), *i.e.*, whole inam villages. Here we have four sub-clauses defining different categories of private land in such villages. The first sub-clause (1) 'private land' means the domain or homefarm land of the landholder, by whatever designation known, such as kambattam, khas, sir or pannai.

The second sub-clause relates to lands which are proved to have been cultivated as private land by the landholder himself for a continuous period of twelve years prior to the first July, 1908. There is a proviso added in these words "provided that the landholder has retained the kudiwaram ever since and has not converted the land into ryoti land." Clause (*iii*) provides that private land also includes land which is proved to have been cultivated by the landholder himself by his own servants or by hired labour with his own or hired stock for a continuous period of twelve years immediately before the first day of November 1933 provided that the landholder has retained the kudiwaram ever since and has not converted the land into ryoti land. The fourth sub-clause includes in the definition of private land those lands in which the kudiwaram was acquired by the landlord prior to the first day of November 1933 for valuable consideration provided the landholder retained the kudiwaram and did not convert it into ryoti land and provided further that where the kudiwaram was acquired at a sale for arrear of rent, the land shall not be deemed to be private land unless it was proved that it was cultivated by the landholder himself, by his own servants or by hired labour for a period of twelve years before the commencement of the Third Amending Act of 1936. This definition is an attempt to save some of the rights of the holders of whole inam villages

which were not estates prior to the Amending Act and which became estates by reason of the Amending Act of 1936. Even under the amended Act as it now stands, the rule of evidence enacted in the old section 185 is retained and some further rules of evidence are enacted in section 185 in cases of estates falling within section 3 (2) (*d*). Further we have two new sections added, 185-A and 185-B.

The question to be decided in this case is whether the lands in question are private lands within the meaning of section 3 (10) (*b*) (*iv*). It is not the case of the landholder respondent that his case is covered by clauses (*i*), (*ii*) or (*iii*) of section 3 (10) (*b*) and reliance is placed only on clause (*iv*). The relevant wording of that clause to be considered is whether the suit land is:

"land the entire kudivaram in which was acquired by the landholder before the first day of November, 1933, for valuable consideration from a person owning the kudivaram but not the melvaram, provided that the landholder has retained the kudivaram ever since and has not converted the land into ryoti land".

Both the lower Courts have found that the documents exhibited for the respondents prove the acquisition of the kudivaram right by the landholder. Under the exception to section 8 of the Act of 1908, the suit lands ceased to form part of the estate and under the Amendment Act, they are private lands under the sub-clause just mentioned.

The identity of the properties covered by the sale deeds produced by the respondents with the lands in question was disputed. But on a reference to the plaint filed by the appellant we find an express admission that the kudivaram interest in the suit lands originally belonged to various persons and that they were acquired by the defendants' predecessors-in-title in the course of several years by purchase from the other kudivaramdars in discharge of arrears of rent and also for other consideration. The sale deeds produced show that in several cases, a small portion of the consideration was the arrears of rent due and that the major portion of the consideration was cash paid. In view of the admission contained in paragraph 3 of the plaint, it is unnecessary to go into the various sale deeds in detail. The conclusion must therefore be that the landholder purchased the kudivaram from the persons who owned that right for arrears of rent and also for other valuable consideration.

The next argument is based upon the proviso in the clause that the landholder should have retained the kudivaram ever since and should not have converted the land into ryoti land. It is urged that the fact that the lands have been leased to the appellant for the last 25 years proves that the landholder has not retained the kudivaram and that he has converted them into ryoti land. There are no materials placed before us to show that the lands were ever converted into ryoti land. Conversion of private land into ryoti land may be by express grant as in the case which arose for consideration before a Full Bench of this Court in *Chellikani Kondayya Rao* v. *Uppalapatti Naganna*[1] or possibly by leasing them along with admitted ryoti lands under a single patta with terms which are inconsistent with the landlord's absolute right in them. There is no document in favour of the appellant. There is not even a single kist receipt produced. Exs. M to Y are merely letters demanding the delivery of a certain quantity of paddy which was apparently the rent payable by the appellant. No doubt the appellant has been allowed to be in possession for nearly 25 years but as has been pointed out by this Court more than once, this may be due to the landlord's desire to retain a good tenant. This circumstance by itself cannot be taken as amounting to a conversion of private land into ryoti land, nor can it, in our opinion, be taken to indicate that the landholder has not retained the kudivaram interest in him. Whether the retention of the kudivaram and the non-conversion of the land into ryoti land are regarded as two distinct conditions to be fulfilled or as meaning the same thing, it is clear that, in this case, there has been no conversion and there is no indication that the landholder Mahalinga Ayyar ever intended to part with the kudivaram right. All that appears is that he has allowed the defendant (appellant) to cultivate the land for a number of years.

---

1. (1941) 1 M.L.J. 336 : I.L.R. (1941) Mad. 720 (F.B.).

The expression 'kudivaram' has been the subject of consideration in several cases. In *Suryanarayana* v. *Patanna*[1], the Judicial Committee observed thus:

"The term 'kudivaram' is not defined in the Act. It is a Tamil word, and literally signifies a cultivator's share in the produce of land held by him as distinguished from the landlord's share in the produce of the land received by him as rent. The landlord's share is sometimes designated 'melvaram'. The 'kudivaram interest' an expression occurring in section 8 of the Act, is apparently understood by the High Court at Madras as meaning a right to occupy land permanently".

The expression 'retention of kudivaram' must be understood to mean the retention of the right to cultivate which means that the landholder may, if he chooses, take back the land and cultivate it himself. On the facts of this case, we hold that the landholder retained the right to cultivate or in other words, that he retained the kudivaram. The expressions used in the letters relied upon by the appellant show that Mahalinga Ayyar treated himself as the absolute owner of these lands and that he treated the appellant as a mere tenant whom he could eject at will.

Then the question is whether the further proviso to section 3 (10) (*b*) (*iv*) applies to this case and that proviso runs as follows:

"Provided further that, where the kudivaram was acquired at a sale for arrears of rent the land shall not be deemed to be private land unless it is proved to have been cultivated by the landholder himself, by his own servants or by hired labour...."

If the acquisition of the kudivaram is within the proviso, then the land will not be considered to be private land, but the landholder will have the limited right conferred by sections 185-A and 185-B. The proviso applies if the kudivaram was acquired *at a sale for arrears of rent*. This expression seems to us to contemplate a sale held by a Court or revenue officer acting under the powers conferred by law and not a private sale by the owner of the kudivaram. Purchase by a private sale can hardly be termed an acquisition "at a sale for arrears of rent."

These second appeals fail and are dismissed with costs.

B.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Juluri Venkataratnam and others .. *Appellants**

v.

Kollipara Ramakotayya and another .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5)—Applications in accordance with law—Decree-holder not carrying out directions of Court for effectual execution—Applications, none the less steps in aid of execution.

It is not every defect in an execution application that will render the application 'not one' in accordance with law. Where the prior execution applications were in accordance with law, but the decree-holder persistently refused to carry out certain directions of the Court which were necessary for effectual execution and the execution petitions were consequently dismissed there is no ground for saying that these applications are not steps in aid of execution or that the final orders passed thereon cannot give a fresh start for purposes of limitation.

Appeal against the order of the Court of the Subordinate Judge of Guntur, dated 14th September, 1943, and made in A. S. No. 164 of 1943 (E. P. No. 1033 of 1942 in O. S. No. 774 of 1929, District Munsiff Court, Guntur).

N. Subramaniam for Appellants.

P. S. Srinivasa Aiyangar for 1st Respondent.

The Court delivered the following

JUDGMENT.—The lower appellate Court has not appreciated the requirements of a step in aid of execution. What has to be decided is whether the prior execution applications were applications in accordance with law. If the prior applications were in accordance with law, then they serve as steps in aid of execution and the final order passed on such applications give a fresh start. The question therefore is whether the previous applications had been presented in accordance with law. As has been repeatedly pointed out by this Court, it is not every defect in an execution application that will render the application "not one" in accordance with

---

1. (1918) 36 M.L.J. 585: L.R. 45 I.A. 209: I.L.R. 41 Mad. 1012 at 1018 (P.C.).

*A.A.A.O. No. 131 of 1944. 22nd February, 1945.

law. In this case the previous applications were filed without any defect whatever. No doubt certain further acts may be required by the Court to be done before effectual execution can be ordered on those very applications. The sale papers may be directed to be filed and several other acts may be required to be done by the decree-holder before the Court can proceed with the execution and if the decree-holder does not comply with those requirements, the execution petition may be dismissed. But that is far from saying that the applications themselves were not presented in accordance with law. Here the appellate Court has not pointed out a single defect in the prior execution applications which will take the case out of Article 182. The decree-holder may have no doubt persistently refused to carry out certain directions of the Court which were directed to be done, in all the three prior applications. But that is no ground for saying that those applications are not steps in aid of execution.

The order of the lower appellate Court is set aside and that of the District Munsiff restored with costs throughout.

(No leave).

V.P.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Mrs. E. C. Vas .. *Appellant**

v.

Miss Josephine Hilda Lobo .. *Respondent.*

Partial partition—Rule against—Alienee of a half share in possession of property filing suit—Another half share in the hands of another alienee—Whether the suit for partition of that other half share only instead of the entire original holding of the assignors could lie.

Where the plaintiff was in fact seeking to retain possession of a localised half share in an original holding to which she was entitled only on the basis of an informal division between the parties, while separately working out her legal right to the division of the other localised half share which had come into the possession of another alienee, in a suit for partition of the share allotted to the assignors of the other alienee,

Held, that the framing of the suit was designed to defeat the equity of the defendant while putting the plaintiff in a position of retaining the whole of one localised half share until disturbed by the defendant's alienors, who presumably were no longer interested in the property. This was exactly a case where the rule against partial partition should be enforced.

Iburamsa Rowthan v. *Thiruvenkatasami Naick*, (1910) 20 M.L.J. 743 : I.L.R. 34 Mad. 269 (F.B.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 451 of 1943, preferred against the decree of the Court of the District Munsiff, Mangalore, in O. S. No. 114 of 1941.

A. Narayana Pai for Appellant.

T. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff brought a suit for partition and possession of 72 cents in R. S. No. 57/8, which is plot D in the plan in the case. The suit was dismissed as being one for partial partition which would prevent the working out of the equities and the appeal to the lower Court has been dismissed on the same ground.

The admitted facts may be briefly summarised. The family of one Mascarenhas originally owned two contiguous plots of land described as plots D and B in the plan. These at that time formed a single holding, though plot B, measuring 74 cents, is now the northern portion of R. S. No. 57/1. Under a decree of Court this holding comprising the two plots was assigned for life to one Catherine Robelle with a remainder in four shares to other members of the family. Catherine Robelle

* S. A. No. 1975 of 1944. 11th April, 1945.

gave to Mr. Lobo, owner of adjacent property, a lease of the whole of the land. During the currency of this lease Mr. Lobo purchased half of the land from the persons entitled to the remainder therein. In 1920 the plaintiff acquired the rights of Mr. Lobo and she was in possession as lessee and part-owner when Catherine Robelle died in 1921. After her death the other sharers appear to have got possession of plot D, which is roughly half of the land. A one-fourth share in the holding had devolved upon one Martha who left a will. Her executor brought a suit for partition of the testatrix's share. The schedule to the plaint described only plot D, namely, R. S. No. 57/8 as if this were the whole land in which the share was to be worked out. The present plaintiff was impleaded as a party in that suit and it was conceded that she was entitled to a half share in the land. A preliminary decree was passed on that footing. After the preliminary decree was passed, the executor seems to have discovered that the schedule to the plaint did not include all the land in which the testatrix was entitled to a share and therefore no partition was effected and there was no final decree. It would seem, however, that the parties continued to enjoy the land on the footing that the plaintiff retained the whole of the plot B and the other sharers retained the whole of the present suit land, plot D.

By a series of sale deeds the defendant purchased the rights of the other sharers. These sale deeds purport to convey not a half share in plots B and D, but the whole of plot D, that is to say, the sale deeds proceeded on the footing that the actual enjoyment represented a legal partition. In accordance with this informal division both the parties have built houses ofconsiderable value, the plaintiff having built in plot B and the defendant in plot D. They are closely related and, as not infrequently happens, they have quarrelled. As a result of this quarrel the defendant was asserting rights in plot B and the plaintiff has filed the present suit in which she claims a partition and possession of a half share in plot D, without bringing plot B into the suit and without impleading the assignors of the defendant.

In appeal the claim of the plaintiff has been rested on the decision in *Iburamsa Rowthan* v. *Thiruvenkatasami Naick*[1]. That was a case in which certain items of coparcenary property had been conveyed in their entirety by different coparceners to two alienees and it was held that as between alienees the rights in these items could be worked out in a suit for partition which did not embrace unalienated family properties in which neither party claimed any interest. It seems to me that the decision of the Full Bench has very little bearing on the present facts. What the plaintiff is in fact seeking here is to retain possession of a localised half share in the original holding to which she is entitled only on the basis of an informal division between the parties, while separately working out her legal right to the division of the other localised half share which has come into the possession of another alienee. If there were a general suit for partition of the entire holding the defendant would be entitled to claim an equity whereby the property which has been sold to her should be allotted in partition to her vendors, so that she would get that which she has purchased, and the plaintiff would similarly be entitled to claim that the property of which she is in enjoyment and on which she has built a house at considerable expense should be allotted to her. The framing of the present suit is designed to defeat the equity of the defendant while putting the plaintiff in a position of retaining possession of the whole of one localised half share until disturbed by the defendant's alienors, who presumably are no longer interested in the property. It seems to me that this is emphatically a case in which the rule against partial partition should be enforced. In this view I dismiss the appeal with costs.

Leave to appeal is refused.

K.C. —— *Appeal dismissed.*

---

1. (1910) 20 M.L.J. 743: I.L.R. 34 Mad. 269 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

South Indian Railway Company, Limited, through its agent and General Manager, Mr. J.F.C. Reynolds .. *Appellant**

v.

The Municipal Council, Madura, through its Commissioner, Mr. C. O. Coorey ... *Respondent.*

Railways Act (IX of 1890), sections 11 (3) (*b*) *and* 12—*Applicability—Culvert below railway line to take off overflow water from a tank—Order of Provincial Government for widening culvert—Work carried out by Railway Company—Tank and culvert within Municipal limits—Order of Provincial Government if* ultra vires *—Compensation from Municipality—Right of Railway Company to claim—Contract Act (IX of 1872), section 70—Applicability.*

The plaintiff railway company constructed a culvert under the railway line for taking off water which overflowed from an adjacent tank. The culvert was one of several culverts for taking off the excess water from the tank which was within the Municipal limits and the other culverts were constructed by the municipality. As the culverts were found insufficient to take the entire rain water the Collector raised the question of the construction of additional works and finally decided that the existing culverts should be widened. The Provincial Government acting under section 11 (3) (*b*) of the Indian Railways Act directed the railway administration to widen its culvert at its own cost. The Railway Company complied with the demand and then instituted a suit against the Municipal Council to recover the cost of the work on the ground that the Council was liable therefor. It was contended on behalf of the Railway Company that the order under section 11 (3) (*b*) of the Railways Act was *ultra vires* because the Government could not require a work to be done which was not necessary at the time when the railway was constructed.

Held, that the widening of the railway culvert should be considered as a necessary work even if the test should be the requirements as at the time the railway line was laid out and that the order of the Provincial Government was not *ultra vires*.

Held, further, that the work done by the Railway Company could not be said to be done for the benefit of the Municipality so as to support a claim for compensation against the Municipal Council under section 70 of the Contract Act.

Appeal against the decree of the Court of the Subordinate Judge, Madura, dated 25th October, 1943, in O. S. No. 50 of 1942.

Braddell instructed by *King and Partridge* for Appellant.

B. Sitarama Rao and *C. S. Rama Rao Saheb* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—Within the municipal limits of the town of Madura is a tank called the Anupannady tank over which the South Indian Railway passes. The railway was constructed in 1902 and for the purpose of taking off water which overflowed from this tank a culvert was built under the railway line. The tank on its western side is close to the Chinthamony Road. The water from the tank on this side flows over a weir which has a capacity of 500 cusecs. The culvert built by the railway company was not sufficient in itself to take off all the water flowing out of the tank and the municipality of Madura had to build four other culverts. The water carried by all these culverts flows into a channel constructed by the Government which runs parallel to the Chinthamony Road. In 1936 heavy floods were experienced in the Madura district and it became evident that the culverts, which were only six feet wide, were not large enough to deal with an exceptional flow of water. As a result of the floods in 1936 many houses in this part of Madura were inundated. The Collector raised the question of the construction of additional works and it was decided that the municipal culverts and the railway culvert should each be widened to 20 feet and that the depth should be made 5 feet. There was considerable correspondence on the subject between the Collector, the Commissioner of the Municipality and the District Engineer of the railway company. The railway company objected to pay the costs of re-building its culvert and considered that it should be borne by the municipality or the Government. A suggestion that the banks of the channel should be made higher as an alternative measure was not accepted by the Provincial Government, which on 26th November, 1938, passed an order under the provisions of section 11 (3) (*b*) of the Indian Railways Act, 1890,

* Appeal No. 121 of 1944. 3rd April, 1945.

directing the railway administration to widen its culvert to 20 feet at its own cost within six months of the date of the requisition. In obedience to this order the railway administration widened the railway culvert to the required length. The municipality widened the municipal culverts to the same extent.

On the 25th July, 1942, the South Indian Railway Company, Ltd., filed a suit against the Municipal Council of Madura to recover the sum of Rs. 16,222-5-0 the alleged cost of the work which it had done in accordance with the order of the Government. It claimed that the order passed under section 11 (3) (*b*) of the Indian Railways Act was *ultra vires* because the Government could not require a work to be done which was not necessary in 1902 when the railway was constructed. If it had power at all to require the company to do the work it could, it was said, only act under section 12, in which case the cost would be chargeable to the municipality or the Government. The company further maintained that it was in law entitled to recover the amount from the municipality by reason of the provisions of section 70 of the Indian Contract Act. These contentions were all rejected by the Subordinate Judge. The appeal is from the decree passed by him dismissing the suit.

Sub-section (1) of section 11 specifies the works which a railway company shall undertake and maintain for the accommodation of the owners and occupiers of lands adjoining a railway and they are contained in two clauses (*a*) and (*b*). We are here concerned with clause (*b*) which reads as follows:

> "all necessary arches, tunnels, culverts, drains, watercourses or other passages, over or under, or by the sides of the railway, of such dimensions as will, in the opinion of the Provincial Government, be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be."

The provisions of the section are subject to three provisos set out in sub-section (3). The only one which need be referred to is the second proviso which is in these terms:

> "save as hereinafter in this Chapter provided, a railway administration shall not, except on the requisition of the Provincial Government, be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years from the date on which the railway passing through the lands was first opened for public traffic."

Therefore, no owner or occupier has a right to compel a railway administration to execute any additional accommodation work for his use after ten years have elapsed from the time the railway was opened; but the words "except on the requisition of the Provincial Government" give power to the Government to require an additional accommodation work to be carried out by the railway administration at any time at the cost of the railway administration. Section 12 says:

> "If an owner or occupier of any land affected by a railway considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the Provincial Government or a local authority desires to construct a public road or other work across, under or ever a railway he or it, as the case may be, may at any time require the railway administration to make at his or its expense such further accommodation works as he or it thinks necessary and are agreed to by the railway administration or as, in case of difference of opinion, may be authorised by the general controlling authority."

Section 3 (22) states that the general controlling authority means, in relation to a Federal railway, the Federal railway authority, in relation to a minor railway, the Provincial Government and, in relation to an Indian State Railway, the Governor-General acting in his discretion. The controlling authority here is the Provincial Government.

In support of the contention that the order of the Provincial Government of the 26th November, 1938, is *ultra vires* Mr. Braddell, on behalf of the appellant has relied on two English cases, namely, *Rhondda and Swansea Railway Co.* v. *Talbot*[1] and *Great Western Railway Co.* v. *Talbot*[2]. Before examining the judgments in those cases we must point out that the English law with regard to accommodation works required to be carried out by a railway administration differs in important respects from the law of British India. Section 68 of the Railways Clauses Consolidation Act, 1845, specifies the works which a railway company is required to carry out

1. (1897) 2 Ch. 131. 2. (1902) 2 Ch. 759.

for the accommodation of owners or occupiers of lands adjoining the railway. Section 69 states that if a difference arises in respect of the kind or number of such accommodation works, or the dimensions or sufficiency thereof or respecting the maintenance, it shall be determined by two justices. Section 70 provides for the execution by the party aggrieved of the work found necessary by the justices in the event of the railway company failing to carry out the work itself. Section 71 deals with the power of owners of lands to make additional accommodation works which may prove to be necessary, but at their own expense. By virtue of section 72 such additional works shall be constructed under the superintendence of the railway company's engineer. Section 73 states that the company shall not be compelled to make any further or additional accommodation works after the expiration of the prescribed period, or, if no period be prescribed, after five years from the completion of the works and the opening of the railway for public use.

There is no provision in the English Act corresponding to that contained in section 11 (3) (*b*) of the Indian Railways Act with regard to the power of the Provincial Government to issue a requisition to the railway company to carry out additional accommodation works at its own expense at any time. The period of five years prescribed by the English Act is made ten years by the Indian Act. Under the English Act any dispute is to be settled by two justices, whereas under the Indian Act, the Provincial Government is the arbiter. Under the English Act there is no power given to the justices or to a public authority to issue a requisition, whereas the Indian Act gives a very wide power in this respect to the Provincial Government.

In *Rhondda and Swansea Railway Co.* v. *Talbot*[1], one of the questions related to the accommodation works which the company might be required to make under section 71 of the Railways Clauses Consolidation Act, 1845. It was held that the railway company could not be required to make accommodation works beyond what was really necessary at the time of the construction of the railway; in other words, an alteration in the character of the land and the nature of the neighbourhood could not be taken into consideration. This opinion was re-affirmed by the Court of Appeal in *Great Western Railway Co.* v. *Talbot*[2].

It is said on behalf of the appellant that these decisions should be applied when considering the powers of requisition given to the Provincial Government by section 11 (3) (*b*) of the Indian Act. There are such wide differences between the Railways Clauses Consolidation Act and the Indian Railways Act that we are unable to accept this argument. The Provincial Government has the power at any time to make a requisition however many years may have elapsed since the construction of the railway. In giving such a wide power to the Provincial Government, the Legislature could not, in our judgment, have had the intention of restricting the additional works to what was really required when the railway was constructed. Moreover, it must be borne in mind that the conditions in England are vastly different from the conditions in India. In England when the Railways Clauses Consolidation Act was passed there were in reality no waste lands. The country was to a very large extent developed. When the Indian Railways Act was passed there were vast open spaces much of which were waste lands, and the conditions to-day are not very different, but new inhabited localities do spring up along railways because of the ready means of communication which railways provide.

But even if the rule laid down in the English cases to which reference has been made should be applied to section 11 (3) (*b*) of the Indian Act, it cannot be said that the work which the plaintiff company was called upon to do in 1938 was not a work which was required in 1902. As we have mentioned, the weir on the western side of the Anupannady tank had in 1902 a capacity of 500 cusecs. The same weir is still functioning and it is sufficient for the purpose of taking all surplus water from the tank. The culverts which were erected in 1902 were not sufficient

1. (1897) 2 Ch. 131. 2. (1902) 2 Ch. 759.

to deal with the water which overflowed from the tank as a result of an unusually heavy rainfall. The order which the Provincial Government passed on the 26th November, 1938, stated that the additional works were required in order to discharge 500 cusecs which has always been the capacity of the surplus weir of the Anupannady tank. We hold that the English cases do not apply to section 11 (3) (*b*), but if they do, the widening of the railway culvert to 20 feet was a work which was as necessary in 1902 as it was as in 1938. Therefore, the plea that the order of the Provincial Government is *ultra vires* fails from whichever angle it is viewed.

The suggestion made by the learned counsel for the Railway company that the Provincial Government had only power to make a requisition under section 12 has in effect been answered. Section 12 merely applies when an owner or occupier of land affected by a railway asks for further accommodation works to be carried out or if the Provincial Government or a local authority desires to construct a public road or other work across, under or over a railway. Admittedly the municipality does not own any land adjoining the railway in this locality and it made no request for additional accommodation works. The Provincial Government was not proposing to construct a public road or other work across or under the railway. Under this section the railway company cannot be required to do any work at its own expense and no action was taken by any one under this section. Therefore the section can have no application here.

In answer to a question put by this Court in the course of the arguments, Mr. Braddell made it quite clear that he did not rely on section 11 or section 12 for the company's claim against the municipality. He admitted that the claim against the municipality could only be enforced by reason of section 70 of the Indian Contract Act. Section 70 reads as follows :

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

The railway company could only claim under this section if the work which it did was done for the municipality and the municipality enjoyed the benefit of it. The work was not done for the municipality. It was done under the order of the Government as the result of action being taken by the Collector of Madura, a Government servant. The object of the work was to prevent the flooding of houses and buildings in that locality. It has not been suggested that the municipality owned any of these buildings or houses. Therefore the work which was done was done primarily for the benefit of the private owners of property in the neighbourhood. While the railway company recognises this to be the case it is said that indirectly the municipality receives a benefit because it recovers taxes from the owners or occupiers of the property. This is a very indirect benefit and section 70 can in our opinion only have application where there is direct benefit to the person for whom the work is done. The persons who are enjoying the benefit of this work are the owners and occupiers of the buildings in the locality. It would be doing violence to the section to say that in these circumstances the work was done for the benefit of the Municipality. For these reasons the appeal is dismissed with costs.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ahmed Batcha Sahib and others .. *Appellants**

v.

Mohamed Haneef Sahib .. *Respondent.*

Madras Estates Land Act (I of 1908), *section* 145 *and section* 146—*Insolvency of ryot—Holding vested in Official Assignee in* 1931—*Holding brought to sale under S.* 112, *Madras Estates Land Act, without notice to Official Assignee—Section* 146 *does not apply—Duty of landholder to seek out a transferee or a person on whom the holding had vested.*

---

*S. A. No. 1603 of 1944. 24th April, 1945.

On the insolvency of a ryot his holding had vested in the Official Assignee in 1931. In 1933 the landholder took action under section 112 of the Madras Estates Land Act for arrears of rent and the holding was sold without notice of these proceedings being given to the Official Assignee. In 1934 the son of the insolvent, after the death of the insolvent in the meanwhile, sold the holding to a different person. In 1935, the Official Assignee sold the holding to a third person. In a suit by the legal representative of the vendee from the purchaser in the sale for arrears of rent for possession of the holding from the vendee from the Official Assignee.

Held, That the case was governed by the law as it stood before the amendment of the Madras Estates Land Act in 1934, Section 146 did not apply to the facts of the case. As section 145 is not retrospective, and as it is the duty of the landholder to seek out a transferee or a person on whom the holding had vested and serve the notice upon him before taking any proceedings to enforce payment of arrears of rent, the sale in such proceedings without giving notice to the Official Assignee was not binding upon him.

Ankamma v. *Venkatasubbayya*, (1939) 2 M.L.J. 1 : I.L.R. (1939) Mad. 794 (F.B.); referred to.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in A. S., No 8 of 1944, preferred against the decree of the Court of the District Munsiff, Ranipet, in O. S. No. 166 of 1940.

M. S. Venkatarama Aiyar for Appellants.

T. L. Venkatarama Aiyar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether section 146 of the Madras Estates Land Act, 1908, which was repealed by the Madras Estates Land (Amendment) Act, 1934, applied to a case where a holding had vested in the Official Assignee of Madras on the insolvency of the ryot.

On the 3rd August, 1931, the estate of one Abdul Karim was ordered by this Court to be administered in insolvency. The proceedings had been instituted by a creditor during the lifetime of Abdul Karim, but he died before the order of adjudication was passed. On 2nd June, 1933, the landholder took action under section 112 of the Madras Estates Land Act for arrears of rent and as a result the property was sold to one Abdul Subhan. Notice of these proceedings was not given to the Official Assignee. On 17th November 1934, Abdul Subhan sold the holding to one Rahima Bi, who is now dead and whose heirs are the plaintiffs. On 31st December, 1934, Moosa Miyan, the eldest son of the insolvent, sold the property, to the first defendant. On 15th March, 1935, the Official Assignee conveyed the property to one Abdul Hakim, who on the 17th February, 1937, sold it to the second defendant.

On the 23rd June, 1937, the heirs of Rahima Bi instituted the present suit against the first defendant and his sons (defendants 2 to 4). The suit was for the recovery of possession of the holding. The plaintiffs averred that Rahima Bi had been given possession by the Revenue Court but had been wrongly dispossessed by the first defendant. The first defendant died during the pendency of the suit. The District Munsiff held that the sale to Abdul Subhan was valid and that consequently the Official Assignee was bound by it. The second defendant, who had bought the property from Abdul Hakim to whom the Official Assignee had sold it on the 15th March, 1935, appealed to the Subordinate Court. The Subordinate Judge held that as no notice had been given by the landholder of the proceedings under section 112 of the Madras Estates Land Act, the sale was not binding on the Official Assignee. The present appeal is by the plaintiffs against the decree dismissing their suit.

As the result of the amendment of the Act in 1934, section 145 (5) requires a landholder to recognise as the tenant a person on whom the holding has devolved by operation of law on receiving notice in writing from such person. This is an entirely new provision. Section 146 required a landholder on receiving notice to recognise as the tenant a transferee when the holding had been transferred by the act of a ryot or in execution of a decree or order of a Civil Court passed against the ryot or by a sale for arrears of Government revenue or for a demand recoverable as such arrears. It contained no reference to a devolution by operation of law. In *Ankamma* v. *Venkatasubbayya*[1], a Full Bench of this Court held that the amendments to the Act made in 1934 had no retrospective effect.

1. (1939) 2 M.L.J. 1 : I.L.R. (1939) Mad. 794 (F.B.).

Before the Act of 1908 was placed on the statute book it had been consistently held by this Court that it was the duty of the landholder to seek out a transferee or a person on whom the holding had vested and serve notice upon him before taking any proceedings to enforce the payment of arrears of rent. The present case is governed by the law as it stood before the amendment of 1934. Section 146 clearly did not apply to such a case. Consequently it was the duty of the landholder to seek out the Official Assignee before bringing the property to sale under section 112. Admittedly he did not give notice to the official Assignee and consequently the sale is not binding upon him. It follows that the Subordinate Judge was right in dismissing the suit.

The appeal is dismissed with costs in favour of the respondent.

V.P.S. — *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Kesar Chand and others .. *Appellants**

v.

Uttam Chand and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 145—Security by a Hindu charging ancestral property for obtaining stay of execution of decree against a third party—Construction—Absence of personal liability—Property other than those charged cannot be proceeded against—Transfer of Property Act (IV of 1882), section 68 (1) (c)—Principle cannot be availed of by a charge holder in execution proceedings without resorting to a suit even where the security is impaired—Hindu Law—Debts—Pious obligation—Liability of son to discharge surety debt of father.

In pursuance of an order granting stay of execution of a mortgage decree pending an appeal against it on the furnishing of security "in the form of a charge on immovable property" a surety, a Hindu, executed a security bond charging ancestral property which was worded thus : ". . . I hereby stand surety for . . . minors judgment-debtors, and agree that in the event of the appellate Court's decision being against the judgment-debtors my movable and immovable properties detailed hereunder, shall be liable for making good the deficiency if the sale proceeds of the hypothecated properties are not sufficient to meet the demand, *i. e.* the amount which may be found due from the judgment-debtors according to the decision." In proceedings in execution it was sought to import a personal liability on the surety and make properties other than those charged liable.

Held : Though the expression "I stand surety" may import a personal liability the statement which immediately follows "and agree that . . . my movable and immovable properties detailed hereunder shall be liable" qualifies it and limits the scope of the liability to proceedings against the properties specified, only, thus creating a charge on them excluding all personal liability. The security bond must be considered in the light of the order directing security to be given.

Even assuming that the security has been impaired by the conduct of the surety in transferring a major portion of the property included in the security bond, the privilege conferred by section 68 of the Transfer of Property Act on a mortgagee to sue for money cannot be availed of by a chargeholder in proceedings in execution of a decree without resorting to a suit.

Accordingly the unsecured properties of the surety cannot be validly sold.

As regards the secured property also unless the security bond was executed by the surety for a debt due by himself, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property. A.I.R. 1942 Lah. 6, reversed.

P. V. Subba Rao and *R. Parikh* for Appellants.

Sir T. Strangman and *J. M. Parikh* for Respondent No. 2.

The Judgment of the Court was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the High Court of Judicature at Lahore† dated 16th May, 1941, which affirmed a decree of the Court of the Subordinate Judge, First Class, Montgomery, dated 29th May, 1939, and dismissed the plaintiff's suit.

The appeal arises out of a suit instituted by the plaintiffs—appellants before the Board—for setting aside the sale and for possession of the properties mentioned in the plaint which were sold by Court in execution of a decree, by reason of a surety bond executed by their father Uttam Chand in the circumstances mentioned below. The properties in dispute have been found to be ancestral.

* P. C. A. No. 57 of 1943. 30th April, 1945.
† A.I.R. 1942 Lah. 6.

The main question arising for decision in this appeal is whether the abovementioned surety bond creates or gives rise to a personal liability on Uttam Chand.

Uttam Chand and Dogar Chand, shown in the pedigree given below, were two separated Hindu brothers. Kesar Chand and Ram Lal —appellants 1 and 2— are the sons of Uttam Chand ; Chand Kishan—appellant 3—is the son of Kesar Chand and grandson of Uttam Chand. Uttam Chand and the three appellants constituted a joint Hindu family. Dogar Chand died leaving a widow, and three minor sons, Hans Raj, Sohan Lal, and Des Raj.

MACHHI RAM.

Uttam Chand (deft. 1) respondent 1. — Dogar Chand.

Uttam Chand's sons: Kesar Chand (plff. 1) appellant 1. — Ram Lal (plff. 2) appellant 2.

Dogar Chand's sons: Hans Raj — Sohan Lal — Des Raj.

Kesar Chand's son: Chand Kishan (plff. 3) appellant 3.

On 1st July, 1927, respondent 2, Nand Lal, obtained a preliminary mortgage decree against the minor sons of Dogar Chand, represented by their guardian Uttam Chand, on the basis of a mortgage executed by their mother, for Rs. 7,743, with interest and costs. This decree was made final on 21st January, 1928. Hans Raj and his brothers through their guardian appealed to the High Court against the decree, and prayed for a stay of the execution of the proceedings which had been taken by the decree-holder. The stay asked for was granted by Coldstream, J., who passed the following order on 11th May, 1928 :

" Mr. Anant Ram (Counsel for Nand Lal) asks that his clients may in any case be secured by a charge upon immovable property against loss if the sale is stayed. I think this is a reasonable argument and, having in view all the circumstances, I order that the property be not sold if the petitioners can furnish security in the form of a charge upon immovable property to the satisfaction of the executing Court for paying to the decree-holder in the event of the failure of their appeal, the amount by which the price fetched by the mortgaged property when sold under the decree falls short of the amount then found due to the decree-holder under the provisions of the final decree . . . ."

Thereupon Uttam Chand executed a security bond on 31st July, 1928, in the following form, after stating that the High Court had called upon him to file a security bond to the effect that if the decree money and costs, etc., are not recovered in full from the land he would be liable to make good the deficiency.

" Hence I hereby stand as surety for Hans Raj and others, minors, judgment-debtors, and agree that in the event of the appellate Court's decision being against the judgment-debtors, my movable and immovable properties, detailed hereinafter, shall be liable for making good the deficiency, if the sale proceeds of the hypothecated property are not sufficient to meet the demand, *i.e.*, the amount which may then be found due from the judgment-debtors according to the decision."

The above statement is followed by a list of some items of moveable property, though their security was not called for, and three items of immoveable property.

The appeal before the High Court was compromised, and the Court passed a mortgage decree in terms of the compromise, providing that the property should remain under attachment and that " the security furnished by the surety shall also stand."

As the mortgage debt was not paid in time, the decree-holder took out execution and had the mortgaged property sold. As the decree debt was not realised in full by the sale, the four items of property involved in the suit, which included only one item of secured property, were sold in execution, as before his liability had occurred Uttam Chand had transferred almost all the properties included in the security bond. As stated by the Subordinate Judge :

" it is common ground between the parties that the whole of the property in dispute is outside the scope of the security bond executed by Uttam Chand excepting the house which was purchased by Gehla Ram, defendant 3."

Barring this house, the other properties were purchased by Nand Lal, the decree-holder and respondents 4 to 9 have purchased different plots of land from him after the execution sale had been confirmed in his favour by the executing Court. It is

admitted that Nand Lal has paid Rs. 646-5-0 in discharge of two mortgages on the land purchased by him in the course of the execution.

Their Lordships will now proceed to consider whether the sale of the properties in dispute found to be ancestral, in enforcement of the security bond executed by Uttam Chand, is valid in law and binding on the appellants, his sons and grandson. The liability of the appellants is sought to be based on the pious obligation imposed on a Hindu son to pay his father's debts. In this connexion it may be stated that the appellants did not allege that the debt said to have been incurred by Uttam Chand for which the properties have been sold is an immoral one, nor did the respondents allege that it was raised for the benefit of the family.

The Subordinate Judge held that the security bond was an instrument of charge only and did not create any personal liability, that Uttam Chand had laid himself open to personal liability by reason of his having admittedly transferred a major portion of the properties included in the bond, that the sale of properties not covered by the security bond was justified by the principle expressed in section 68 (1) (c) of the Transfer of Property Act, which says that:

> " the mortgagee has a right to sue for the mortgage money," . . . " where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor,"

and that he was competent to charge family property by the execution of the security bond as the rule of Hindu law forbidding alienations of family property or the creation of charges thereon except for family necessity or for an antecedent debt of the father did not apply to charges created by the father as surety. In the result, he dismissed the appellant's suit. The learned Judges of the High Court disagreeing with the Subordinate Judge held that:

> " on a true construction of the security bond, Uttam Chand had undertaken personal liability, and that it is not possible at that stage to re-open the execution proceedings by holding that no such liability could be enforced."

The latter ground appears to be based on the reasoning stated at the close of the immediately preceding paragraph of the judgment that:

> " the executing Court acted on the assumption that Uttam Chand had undertaken a personal liability and this assumption does not appear to have been challenged at any stage of the proceedings,"

but it must be noticed that the sons and grandson of Uttam Chand have a valid right of challenging that assumption by instituting a suit if they can make out a proper case. In the view which the learned Judges took, which they thought was " sufficient to conclude the case," the question of pious obligation did not seem to them to arise for decision ; however, they did not consider it, but nothing turns upon that now. Before passing, it may be mentioned that the learned Judges were not prepared to accept the view of the trial Court that the executing Court would in any case have been entitled to act as it did by virtue of the provisions of section 68, Transfer of Property Act.

Mr. Subba Rao, the learned counsel for the appellants, contended before the Board that Uttam Chand was not personally liable under the terms of the security bond, and that in reality there was no debt due by him outstanding in consequence of which family property, either secured or unsecured, could be sold. The main question for their Lordships to consider is whether the security bond imposes any personal liability on Uttam Chand, for unless this is established first, properties other than those covered by the security bond can in no event be validly sold. It was argued by Sir Thomas Strangman that the expression " I stand surety for Hans Raj and others " appearing at the commencement of the operative portion of the deed to which their Lordships have already called attention, means I promise to pay, and imports personal liability. The argument is not without some force, but their Lordships have, after careful consideration, come to the conclusion that the statement which immediately follows the expression referred to, namely, " and agree that . . . . my movable and immovable properties detailed hereunder shall be liable " qualifies it and limits the scope of the liability to proceedings against the properties specified only, thus creating a charge on them excluding all personal liability. That this is the proper construction that should be

put upon the document appears to be clear from the order passed by Coldstream, J., when he stayed the execution of the decree. That order states clearly that the property should not be sold if the petitioners can furnish surety "in the form of a charge upon immovable property" and it was complied with by Uttam Chand by executing the bond in question. Their Lordships pointed out in *Raja Raghunandan Prasad Singh* v. *Raja Kirtyanand Singh*[1], where the construction of a security bond executed in pursuance of an order passed by the Court arose for decision that it "must be considered in the light of the order directing security to be given." Read in the light of Coldstream, J.,'s order, there can be no doubt that the obligation undertaken by Uttam Chand was merely confined to the extent of the properties charged by him for the satisfaction of the amount. Another argument urged by the learned Counsel in support of his contention, *viz.*, that the appropriate form of the bond in a case of this kind, as may be seen from Appendix G, Civil Procedure Code, would clearly provide for a personal liability, and that the order for furnishing security must therefore be construed as having been made with reference to such a form, overlooks the fact that the order of the Court is perfectly clear, and what their Lordships are called upon to do is to construe a specific document with reference to its specific terms, and if need be in the light of the Court's order, which, as they have already stated, is not open to any doubt. The next argument, that the inclusion of the moveable properties in the deed would suggest that Uttam Chand had thereby undertaken personal liability, cannot be accepted as the terms of the document do not impose any such liability and nothing is known as to why those items were included in the deed. The last argument advanced in this connexion, that even if there is no personal liability originally incurred by Uttam Chand under the stipulations of the security bond, he became personally liable as he had transferred a major portion of the property included by him in the security bond, should also be disallowed as it was not made clear to their Lordships how in the present case the privilege conferred by section 68, Transfer of Property Act, on a mortgagee to sue for money can be availed of by a charge holder, in proceedings in execution of a decree, without resorting to a suit, assuming that the security has been impaired by the conduct of Uttam Chand which itself is open to some doubt. For these reasons, their Lordships hold that as it is not shown that Uttam Chand has made himself personally liable for the amount that remained due to the decree-holder there was no debt due from him, and it follows therefore that the unsecured property in question cannot be validly sold in enforcement of the security bond. The same is the position with regard to the secured property also. To make the ancestral property liable, there must in reality be a debt due by the father. In the present case, the security bond was executed not for the payment of any debt due by Uttam Chand, but for payment of a debt which was due from third parties. Unless there was a debt due by the father for which the security bond was executed, the doctrine of pious obligation of the sons to pay their father's debt cannot make the transaction binding on the ancestral property.

For the foregoing reasons their Lordships are of opinion that this appeal should be allowed and that the decrees of the Courts in India should be set aside and that it should be declared that the security bond dated 31st July, 1928, executed by Uttam Chand in *Nand Lal* v. *Hans Raj and others* is not binding on the appellants or on the properties comprised therein; that the sale proceedings in execution of the decree of defendant 2 in *Nand Lal* v. *Hans Raj and others* relating to the joint family properties of the appellants and defendant 1 (described in para 4 and list A of the plaint) are null and void and (*a*) the purchasers at the auction sales, namely, Nand Lal and Gehla Ram defendant 3 and (*b*) the alienees of Nand Lal, namely, defendants 4 to 9 acquired no title to the said properties; that each of defendants 2 to 9 do put the appellants and defendant 1 in possession of such of the properties described in para 4 and list A of the plaint as he may be possessed of; so far as defendant 2 is concerned on being paid Rs. 646-5-0; and that defendants 2 to 9 should pay the appellants the costs of this appeal and their costs incurred in the High Court and

1. (1932) 63 M.L.J. 85.

the Court of the Subordinate Judge, First Class, Montgomery. It is said that defendants 2 to 9 have been in possession of the properties and have deprived the appellants' family of possession and enjoyment of the same and that it is just and right that they should account for the profits received or which might have been received by them. Their Lordships think that whatever rights the appellants may have in this respect should be claimed by them in a separate suit which will not be barred by these proceedings. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant : *Lambert and White.*

Solicitors for Respondent 2 : *T. L. Wilson and Co.*

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Rao Bahadur S. A. S. RM. Ramanathan Chettiar .. *Appellant**

v.

M. P. Palaniappa Chettiar and others .. *Respondents.*

Trust—Endowment in favour of temple—Essentials for constitution of—Mere book entry crediting amounts in donor's books—Not sufficient.

Madras Hindu Religious Endowments Act (II of 1927), section 73—Suit under—Scheme—Court has no power to settle.

An allocation of specific property or fund to charity is essential both for effecting an endowment under the Hindu Law and for creating a valid trust. A mere credit entry in the donor's account books without setting aside and appropriating the sum credited is not sufficient to create a valid trust.

[Modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made discussed.]

The Court has no power to settle a scheme in a suit brought under section 73 of the Madras Hindu Religious Endowments Act. The Act vests the power of settling schemes initially in a statutory body, namely, the Board constituted under section 10, and the Civil Court's jurisdiction is limited to the modification or cancellation of schemes settled by the Board in the first instance or of schemes settled by the Court itself under the Act or deemed to be settled under the Act.

Appeal against the decree of the District Court of South Arcot, dated 20th February, 1939, and passed in O. S. No. 37 of 1935.

A. Swaminatha Aiyar and *M. S. Thyagaraja Aiyar* for Appellant.

K. Rajah Aiyar for *V. Ramaswami Aiyar* and *N. G. Krishna Aiyangar* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal from the judgment and decree of the Court of the District Judge of South Arcot dismissing with costs a suit brought by the appellant under section 73 of the Madras Hindu Religious Endowments Act (II of 1927) for the removal of the respondents and two other members of their family, since deceased, from the trusteeship of a temple known as *Sri Elamaiyakkinar* temple situated at Chidambaram, for the appointment of a proper trustee and for an account of the respondents' management of the temple properties. The appellant alleged in his plaint various acts of misfeasance and malfeasance and misappropriation of trust moneys by the respondents' family in the course of their management, as grounds for the reliefs sought. The respondents pleaded, *inter alia*, that the appellant was not a "person having interest" in the temple within the meaning of the Act referred to above and was therefore not entitled to sue, that the temple owned only about one acre of nanja land in cusba Chidambaram, which fetched an annual rent of about 15 to 20 *kalams* of paddy, that it had no other source of income, that the temple was maintained only by the private munificence of the respondents and that they were not accountable. The respondents also denied the allegations of mismanagement and breaches of trust and claimed to be the hereditary trustees of the temple not liable to be removed. The Court below held that the appellant was not entitled to sue as a person having interest in the temple and that he had failed to prove that the respondents or any of them committed any of the acts of misfeasance or malfeasance alleged in the plaint, and dismissed the suit.

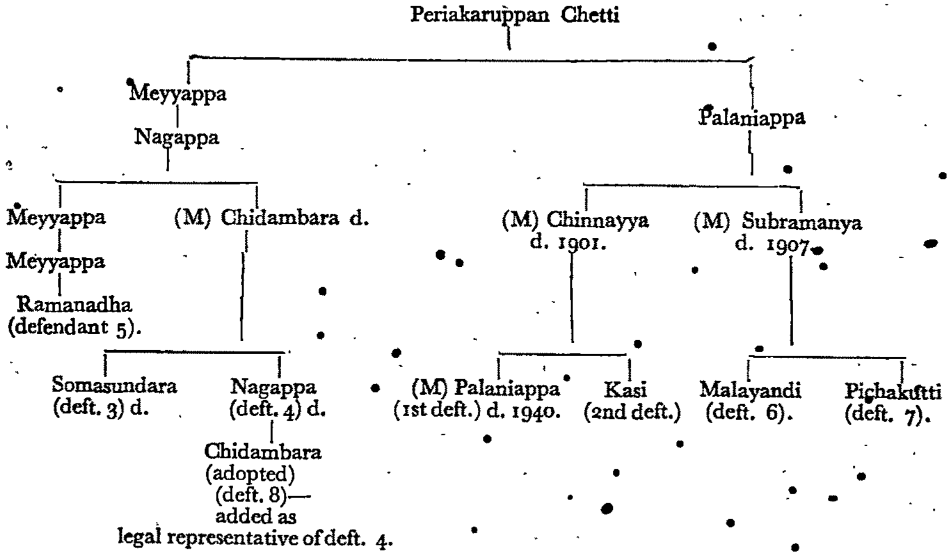
---

* Appeal No. 332 of 1939. 31st August, 1944.

At the previous hearing of the appeal this Court held that the appellant came within the definition of a "person having interest" in section 9, sub-section 9, of the aforesaid Act and was thus entitled to sue and, finding that the trial was neither complete nor satisfactory, set aside the dismissal of the suit and referred the case back to the lower Court for trial on the following issues: (*i*) Whether any amounts or properties have been dedicated in trust to the *navarathri kattalai*, *deepa kattalai* and *uchikala kattalai* and are in the hands of the defendants. (*ii*) Whether any fund or property has been dedicated to the *pooja paditharam* and is in the hands of the defendants. (*iii*) Whether any immoveable properties other than the admitted extent of one acre and odd have been dedicated to the temple and are in the hands of the defendants. (*iv*) Whether there has been any breach of trust by the defendants in respect of the above funds or properties. Both parties were permitted to adduce additional evidence on these issues. The learned Judge having submitted his findings after an elaborate trial, the appeal comes on for further hearing and disposal.

It is common ground that the temple in question is an "excepted temple" as that term is defined in section 9, sub-section 5 of the said Act and that the respondents' family are the hereditary trustees thereof. It is also common ground that the family carried out extensive renovations and repairs to the temple premises spending large sums of money for the purpose, though the source of the money is a matter of dispute between the parties; the appellant alleging that the bulk, if not the whole of it, consisted of subscriptions collected from the public, while the respondents alleged that practically all the money came out of their own family funds. It is also not seriously disputed that the respondents have throughout been conducting the customary services and festivals in the temple in accordance with *mamool* and that the temple has been greatly benefited by their management.

The following pedigree shows the relationship of the respondents to one another and the persons who have been in management of the temple on behalf of the family from time to time (marked by the letter "M" annexed to their names).



Before dealing with the issues as to the extent of the temple properties and the accountability of the respondents for the management thereof, it will be convenient to consider the claim for their removal from trusteeship. At the retrial after remand, numerous charges of misfeasance and breach of trust were raised against the respondents, but the learned District Judge after an elaborate investigation found that, though there has been some irregularity, no serious charge involving dishonest or

fraudulent conduct was brought home to the members of the respondents' family, and he has recorded his general impression that they had, on the whole, dealt with the temple honestly and fairly. We may state at once that, after hearing Mr. Swaminatha Ayyar, the appellant's learned Counsel, at considerable length we agree with the learned Judge's conclusion and share his impression. Most of the charges of suppression of temple funds and misappropriation thereof based upon entries in the accounts produced by the respondents turned out, on a careful scrutiny of the accounts, to be altogether unfounded, their formulation appearing in many cases to be due to a misappreheesion of the relative entries. Apart from the respondents' alleged failure to account for certain moneys claimed to be trust moneys, which will be dealt with presently, practically the only charge which calls for serious consideration, as a ground for removal, is the denial, in certain proceedings before the Hindu Religious Endowments Board and in the present litigation, of the existence of any trust fund or property except one acre of inam land situated in cusba Chidambaram. It is now admitted that the temple owns and has always owned considerable immoveable properties in the shape of lands and houses in Chidambaram and surrounding villages, and also certain funds dedicated for kattalais. While so, it was represented to the Board in 1929 by the fourth defendant, acting on behalf of the family, that the temple owned only one acre of land and no other property. He stated : " It (the temple) owns one acre nearly. It gets an income of 20 kalams. Apart from this it has no other income. The expenses are met from our family."

Acting on this representation, the Board passed an order, dated 8th October, 1929 (Exhibit V) excluding the temple from the scope of the Madras Hindu Religious Endowments Act. Again, in the written statement filed in this suit by the fourth defendant on 13th February, 1936, which was adopted by the respondents, a similar denial was made, and it was repeated by the first respondent in his petition to the Board filed on 21st June, 1937, for a declaration that the temple was an " excepted temple " within the meaning of the Act, as also in his deposition as D. W. 2 at the original trial of this suit in 1939. It would also appear that in 1934, presumably in anticipation of this suit, the respondents opened a new set of accounts known as " P. R. M. P. kattalai accounts " to which they transferred all the properties of the temple which had till then been shown in the temple accounts, and it was not until it became clear at the trial that the appellant would succeed in establishing the title of the temple that they conceded its ownership of the properties. It will thus be seen that the fourth defendant and the first defendant falsely denied the title of the temple to a considerable extent of immoveable properties which are now admitted to belong to it, and there can be no doubt that this conduct, whatever the motive behind it, was improper. Mr. Rajah Ayyar, while making no attempt to justify such conduct, submitted that it was probably inspired by an anxiety to make it appear that the temple was a petty temple not worth the trouble of supervision and control by the Board or by the Court, and that it was certainly not due to any dishonest intention to appropriate temple property. The learned Counsel also pointed out that the prominent members of the family who were mainly responsible for the ill-advised denial of the trust, *viz.*, the fourth defendant and the first respondent, were both dead and that the other respondents, beyond adopting the written statement filed by the fourth defendant in this suit, did not actively take part in such denial at any time before suit. These submissions are not without force and, while we are not prepared to acquit the respondents altogether of improper conduct, we consider, agreeing with the learned District Judge, that it does not justify their removal from the office of Dharmakarta—cf. *Sivasankara* v. *Vedagiri*[1].

It is unnecessary to go into the details of the dispute regarding the immoveable properties belonging to the temple. As has been stated, it is now admitted by the respondents that the temple owns lands in the Elanangur and Vayalamur villages exclusively and the lands in Nandimangalam village jointly with the Ponnambalam Mutt situated in Chidambaram. It is also admitted that the houses and buildings

---

1. (1889) I.L.R. 13 Mad. 6.

in Chidambaram town claimed by the appellant to be temple properties, except those covered by the sale deeds Exhibits XXI and XXI-*a* and XXII, belong to the temple. Even in the last mentioned properties the respondents do not claim any beneficial interest, but only state that they appertain to a distinct charity, namely, the Patasala, known as " Elamaiyakkinar Koil Patasala " situated at Chidambaram. The Court below has accepted this case and the appellant's learned counsel has not succeeded in showing that the finding is wrong. Similarly, as regards the lands in certain other villages alleged to belong to the temple, it has been found that the ownership of the temple was not established and the appellant has been unable to displace that finding. It is admitted that certain immoveable properties were purchased for the *navarathri kattalai* in 1934 under Exhibit D-1, but it is represented on behalf of the respondents that these properties were reconveyed to the original owner in pursuance of an agreement in that behalf and that the proceeds have been invested on a mortgage of immoveable properties with the sanction of the Hindu Religious Endowments Board. This transaction is said to have taken place after the judgment of the lower Court was pronounced. The respondents also admit that they have a sum of Rs. 1,122-5-0 in their hands as a capital fund endowed by one Swaminatha Pillai for *akanda deepam kattalai* (perpetual burning of light at the shrine) and they have expressed their willingness to hold it subject to such directions as the Court may think fit to issue.

Turning now to the main question as to respondents' liability to account for various trust funds alleged to be in their hands, the claim relates to three sums found credited in the accounts of the Rangoon M.P. business and one sum credited in the Madras M. P. P. C. T. business. The respondents' family were the proprietors of the business at both places. In the Rangoon books the credits appear in three different folios headed " *pooja paditharam kattalai* " (Rs. 37,347-2-3 as on 17th September, 1909), " *deepa kattalai* " (Rs. 1,859-13-0 as on 16th September, 1909) and " *uchikala kattalai* " (Rs. 4,634-7-3 as on 4th September, 1909), and in the Madras account a sum of Rs. 1,404-11-0 stands credited as on 6th September, 1906, in the folio headed " *kattalai* account of Elamaiyakkinar temple, Chidambaram." As the first mentioned amount is by far the largest, the controversy centred mainly round that item but, as the respondents' answer to all these claims is substantially the same, the main consideration relevant to that item apply to the other items as well. It may be mentioned here that, though the entry relating to the *uchikala kattalai* would seem to show that one Sigappi Achi was the donor, it is in evidence that she was the paternal aunt of the fifth defendant and that, after she died without issue, her stridhanam properties reverted, according to custom among the Nattukottai Chetti community, to her parents' family, *i.e.*, to the respondents' family who caused the credit entries to be made in her name. On 4th October, 1899 an account headed " *pooja paditharam* of Elamaiyakkinar Kovil at Chidambaram " was opened in the Rangoon books and a sum of Rs. 3,000 was credited therein. It was followed by various other credits and, in 1904, amounts credited under other heads were also brought into this account so as to augment the balance to Rs. 24,877-14-3 in April, 1905, which with further interest amounted to Rs. 37,347-2-3 on 16th September, 1909. No further interest was added, but there were numerous drawings between 1909 and 1912 which reduced the credit balance to Rs. 28,857-10-0 as on 1st October, 1912. This balance does not appear to have been carried forward to any other account and remains unadjusted. It is admitted that some of the credits represent contributions made by third parties for various subsidiary *kattalais* brought under this head, and there can be no doubt that the respondents would be liable to account for such amounts if the latter still remained unexpended in their hands. But, as pointed out by the learned District Judge, these contributions were relatively very small, and it has not been shown that their total, even if Rangoon *tavanai* interest is added, would exceed the sum of about Rs. 8,000, drawn from this account from 1909 to 1912 for expenditure on the pooja and other services in the temple during that period. We may mention here, only to dismiss, the suggestion that these contributions were made as permanent endowments, the interest on which alone being

intended to be spent on the services. The very smallness of the contributions and the recitals in some of the entries clearly indicate that the amounts were intended to be spent in their entirety on the services specified. The sums received from outsiders and credited in the account may, therefore, be taken to have been more than accounted for by the drawings for expenses of the services in the temple between 1909 and 1912. The question then is whether the other credit in the accounts made at the instance of one or other member of the respondents' own family evidence valid gifts or trusts made or created in favour of the charity.

In support of the suggestion that these credits represented actual sums of money appropriated for the performance of the services and held as deposits, reliance was placed on the reference to *hundis* sent from *oor* (*i.e.*, Karaikudi, the respondents' headquarters) in the opening credit entry of Rs. 3,000 in the *pooja paditharam* account and in the credit entry of Rs. 1,600 in the *deepa kattalai* account. The books of the Rangoon business for the year 1899 in which the entry was made are not forthcoming, but the *oorkadai* or the headquarters accounts relating to the period have been produced. In these accounts the amount is credited to the Rangoon business and debited as an expense on 15th November, 1899. The entry runs thus: "Credit-again as on the said date (*i.e.*, 19th Purattasi Vikari corresponding to 4th October, 1899) for the *pooja paditharam* of *Youvaneswarar* (*i.e.*, the principal deity) at Chidambaram Rs. 2,000 and for the *pooja paditharam* of *Visveswarar*, *Visalakshi* and *Nandikeswarar* (subsidiary deities in the suit temple) Rs. 1,000, by one hundi, bearing half per cent. interest written and given—Rs. 3,000." The debit entry in the account is in similar terms with the words "for purchasing village" added at the end. It is clear from these entries that at Rangoon the amount must have been credited to the *pooja paditharam* account and debited to *oor*, an inference supported by the similar entries relating to the *deepa kattalai* made in the year 1907 for which the Rangoon books are produced. A sum of Rs. 1,600 was then credited to that *kattalai* and debited to "Karaikudi P.S." *i.e.*, the father of defendants 5 and 6, who appears to have sent the hundi in that case. There was some controversy as to the meaning of these entries, the appellant suggesting that the reference to the *hundis* indicated that the agent of the business at Rangoon must have realised the *hundis* and credited the proceeds in the respective accounts which accordingly must be taken to evidence actual appropriations of moneys for the services, while the respondents urged that it was apparent, from the amounts being debited by the Rangoon agent to the *oorkadai* in the one case and to the father of defendants 5 and 6 in the other, that the hundis must have been drawn on the Rangoon M. P. firm itself, and that they were no more than letters of instruction, and the entry itself was a mere book entry without any fund having come into the hands of the agent and actually appropriated to the charities. As the transactions took place many years ago, no witness who could speak to the details thereof from his personal knowledge was available, and the matter has to be decided on the entries alone. If the *hundis* had been drawn upon a stranger firm and the Rangoon agent cashed them and got the money, there would be no need for him, on crediting the amounts to the respective services, to debit the same to *oor* or to Karaikudi P.S. It was presumably because no money actually came into the hands of the agent, that on making the credit entries as directed by his principals he had to debit corresponding sums in the manner aforesaid in order to square his accounts. It is therefore reasonably clear that the *hundis* must have been drawn on the agent himself in each case and that no cash or fund actually came into his hands. We are therefore of opinion that the entries in the Rangoon books referred to above were no more than book entries made under instructions sent by the respondents' family without any corresponding sums being actually set apart for the charities at the time. No other credit entries in the *pooja paditharam* account referring to any *hundis* having been sent from *oor* have been brought to our notice, and they must all be taken to represent merely book entries as there is no evidence to show that corresponding sums were either remitted from *oor* or actually set apart at Rangoon for the charity. Can it be said, in such circumstances, that there was an effectual transfer of funds to het temple?

There are three modes in which a voluntary transfer of property in favour of a temple can be validly and effectually made. Firstly, by dedication of the property directly to the deity. This mode is sanctioned by Hindu law and needs no compliance with the provisions of the Transfer of Property Act, there being no transfer of property to a " living person " within the meaning of section 5 of that Act. (See *Gangi Reddi* v. *Tammi Reddi*[1], *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil*[2], and *Narasimha Swami* v. *Venkatalingam*[3].) The subject-matter of a dedication must, however, be some specific property or asset and a mere credit entry in a book of account cannot be the subject of a dedication. Secondly, property may be transferred by way of gift to the trustee or trustees of a temple. Such a transfer, being one made to a living person, must comply with the requirements of section 123 of the Transfer of Property Act and can only be effected, in the case of moveable property, by a registered instrument duly executed or " by delivery." There being no registered instrument here, Mr. Swaminatha Aiyar contended that there was, in the circumstances of the case, a sufficient delivery of the moneys credited to constitute valid gifts. The respondents, he pointed out, were acting in a dual capacity. They were already the trustees of the suit temple and they desired, as donors, to provide for the *pooja paditharam* and allied services therein. They were the proprietors of the Rangoon M. P. firm whose agent was acting as their banker, there being a regular course of remittances and withdrawals. In such circumstances, it was urged, a credit in favour of the temple in the Rangoon accounts under respondents' instructions, balanced by a corresponding debit to them, was the only business mode of transferring the moneys from the respondents as donors to themselves as trustees of the temple, and there was accordingly a valid gift, as delivery under section 123 can be actual as well as constructive. We are unable to accept this argument. We are of opinion that no constructive delivery can be assumed in the circumstances of the present case, as no particular sum was ever separated from the general funds of the respondents' family or business and placed on a footing incompatible with the exercise of beneficial ownership by the respondents' family. It does not even appear that either the family at *oor* or their agent at Rangoon had, on the dates of the credit entries, sufficient cash balance on hand available for an actual allocation to the charity. No valid gifts of money can in such circumstances be held to have been made by the respondents as donors by constructive delivery to themselves as trustees of the temple, as suggested by the appellant's learned counsel. It remains to consider whether the credit entries in question amount in law to the creation of a trust, which is the third mode of voluntary disposition. Here, again, some of the considerations, already adverted to, preclude the finding of a perfectly created trust. The trust in this case being a public religious trust, the provisions of the Trusts Act are, no doubt, inapplicable, but an intention to create a trust and transfer of property are as essential for public as for private trusts. There was no express declaration of trust here and, as has been stated, there was no actual allocation of any sum or sums of money in respect of which the respondents can be said to have divested themselves of all beneficial interest and undertaken the obligations of trustees. A credit entry in favour of a charity which does not correspond to an allocation of the sum credited can amount to no more than a promise to give the sum and, as observed by West, J., in *Hirbai* v. *Jan Mahomed Khalakdina*[4], to promise a thing is not to hold it in trust. The periodical crediting of interest in the same account on which Mr. Swaminatha Aiyar laid stress is no more consistent with a completed gift or perfected trust than with a simple promise to give. On the other hand, the fact that the respondents made no entries in the temple accounts kept by them at Chidambaram corresponding to the credits in their own Rangoon books is certainly more consistent with the supposition of an intention to give than of a gift or trust. Further more, on the latter supposition, the respondents would clearly

---

1. (1927) 52 M.L.J. 524 : L.R. 54 I.A. 136 : I.L.R. 50 Mad. 421 (P.C.).
2. (1939) 1 M.L.J. 192 : (1939) Rang.L.R. 59 (P.C.).
3. (1927) 53 M.L.J. 203 : I.L.R. 50 Mad. 687 (F.B.).
4. (1881) I.L.R. 7 Bom. 229, 243.

be guilty of a breach of trust in employing temple funds in their own business, a thing not to be readily assumed. For all these reasons we must hold that there was no dedication or gift or trust of the sums (other than those received from strangers) appearing in the accounts of the *pooja padiharam* and other *kattalais* in the books at Rangoon and Madras and that the respondents are not accountable for the same.

The above conclusion receives support from two recent decisions of their Lordships of the Judicial Committee in *Sooniram Ramniranjandass* v. *Alagu Nachiyar Koil*[1] and *Chambers* v. *Chambers*[2]. In the first mentioned case a Chettiyar firm of moneylenders credited a certain sum in its books in the name of a temple but there was no allocation of any assets, the firm continuing to use all its funds in its business as before. Interest was credited periodically in the same account, but there were no drawings by the temple. On the adjudication of the firm as insolvent, payment of the amount in full was claimed by the trustee of the temple on the footing that the amount appearing in the account was trust money belonging to the temple. The claim was resisted on the ground that no endowment or trust had been created. It was found that the trustees of the temple were in entire ignorance of the credits, and evidence was given to the effect that it was usual for Chettiyar firms to credit something towards charity, but the manager of the charity had no right to demand payment when they chose and the firm had its discretion to expend any moneys for the temple as occasion might arise. On these facts their Lordships held that there was no endowment of any property and no creation of a trust. Mr. Swaminatha Aiyar attempted to distinguish the decision by pointing out that the trustee of the charity there was a different person and that he had no knowledge of the credit entries made in the accounts of the firm, while in this case no question of communication could arise as the respondents who were the proprietors of the Rangoon business were also the trustees of the suit temple. It is true the decision to some extent proceeded on the evidence adduced in the case to the effect referred to above, but the following observations as to the effect of mere credit entries made in books of account are pertinent to the present case :

"The *prima facie* meaning of the entries in the insolvent's books discloses an intention on the part of the firm to treat itself as debtors to the temple in a sum which should increase as time went on. To hold that they are trustees because they have consented to be debtors would not only be unjustified, but would be inconsistent with their intentions as manifested by their conduct in making no allocation of any assets, in using their whole funds in their business as before and in computing interest at a rate and in a manner applicable to an ordinary customer."

As regards the contention based on the Hindu law of dedication their Lordships made the following remarks :

"The same reasons are equally forceful to disprove the suggestion that the entries effect an endowment of property for the deity. The first question to be asked on that suggestion is, what property has been made debutter or charged in favour of the idol? The second is what proof is there of any such intention? As an interpretation of the conduct of the insolvent firm the theory of endowment breaks down as completely as does the theory that the firm intended to declare itself trustees for the temple."

These passages would seem to show that, in their Lordships' opinion, an allocation of specific property or fund to charity is essential both for effecting an endowment under the Hindu law and for creating a valid trust.

In the other case, a person who was the proprietor of a business instructed the agent in charge to credit large sums in the names of his wife and other relatives in his account books and debit them to his capital account. Letters were also sent intimating that the sums thus credited were in the nature of personal gifts from him and would bear interest at a certain rate but were subject to certain restrictions as to withdrawal. Interest at the said rate was also credited in the same accounts and wife also withdrew various sums of money from time to time. When the bankers who had granted large overdrafts to the business objected to the payment of interest on the amounts credited, the question arose whether there was a valid gift or trust in respect of the said amounts. This Court held that there was neither a completed gift nor a valid trust ; see *Chambers* v. *Chambers*[3]. The gift failed as there

1. (1939) 1 M.L.J. 192 : (1939) Rang.L.R. 617 (P.C.).
2. (1944) 2 M.L.J. 29 : I.L.R. (1944) Mad. 59 (P.C.).
3. (1940) 2 M.L.J. 963.

was no registered instrument or delivery of property as required by section 123 of the Transfer of Property Act. The Court refused to accept the argument that the credit entries in the books amounted to a constructive delivery of the sums credited. The Court also refused to give effect to the incomplete gift as a declaration of trust as there was nothing to show that the donor intended to create a trust or to constitute himself a trustee, his only intention having been to make gifts. This decision was approved by their Lordships of the Privy Council. No attempt was made before them to support the transaction as a gift and, negativing the contention that a valid trust had been created, their Lordships observed :

> "What then was the subject-matter of this alleged trust? Mr. Justice Gentle seems to have been of opinion that it was a fund of two lakhs of rupees. But that was not so. No such sum was ever set aside and appropriated by Mr. Chambers as a fund transferable to Mrs. Chambers of which he was to be a trustee with all the consequential obligations of such a position."

These observations clearly indicate that a mere credit entry without setting aside and appropriating the sum credited is not sufficient to create a valid trust.

In the view we have expressed above as to the respondents' liability to account, it has become unnecessary to consider the further questions as to the rate of interest chargeable to them and the right of reimbursement claimed by them.

Although there was no prayer in the plaint that scheme should be settled for the proper management of the temple and its properties, Mr. Swaminatha Aiyar pressed upon us the desirability of this Court framing a scheme in view of the irregularities brought to light and the conduct of the respondents in denying the existence of trust properties which have now been established to be substantial. Mr. Rajah Ayyar, however, has raised a question as to the power of the Court to grant such relief in this suit which has been brought under section 73 of the Madras Hindu Religious Endowments Act, while making it clear that the respondents have no objection to a proper scheme being framed for the management of the temple and its properties. There can be no doubt as to the desirability of settling a scheme providing for the due administration of the temple and its endowments and for the exercise of adequate supervision over the management. But, having carefully considered the question raised by Mr. Rajah Ayyar, we are constrained to come to the conclusion that the Court has no power to settle a scheme in a suit brought under section 73 of the Madras Hindu Religious Endowments Act.

It is well known that, before the passing of that Act, suits for reliefs in respect of public charities were maintainable under section 92 of the Civil Procedure Code, but section 73 of the Madras Act abrogates section 92 of the Code in regard to suits claiming any relief in respect of the administration or management of a religious endowment in this Province and provides that no such suit shall be instituted except as provided by that Act. A comparison of the two sections reveals that while section 73 is closely modelled on section 92 of the Code, clauses (*f*) and (*g*) of sub-section (*i*) of the latter are omitted from sub-section 1 of the former. The reason for the omission is to be found in the provisions of sections 57, 63, 64 65 and 76 of the Madras Act. The last mentioned section provides for alienation of immoveable trust property subject to certain conditions and limitations and corresponds to clause (*f*) of section 92 (1) of the Code, while the other sections which correspond to clause (*g*) make provision for settling schemes for "non-excepted" and "excepted" temples by the Board constituted under section 10 of that Act. Schemes settled by the Board are to be final, subject to the result of any suit which the trustee or any person having interest may institute to modify or set aside such schemes. Further, provision is made for modification or cancellation, for sufficient cause, of schemes settled by the Court under the Act or "deemed to be settled under the Act"; section 75. It is clear that the Act which is a comprehensive piece of legislation with detailed provisions for the efficient protection, control and supervision of Hindu Religious Endowments in this province, vests the power of settling schemes initially in a statutory body, namely, the Board constituted under section 10, and the Civil Court's jurisdiction is limited to the modification or cancellation of schemes settled by the Board in the first instance or of schemes settled by the Court itself under the

Act or deemed to be settled under the Act. We are therefore of opinion that this Court has no power in these proceedings to formulate a scheme for the suit temple as suggested for the appellant. It is left to the Board to take suitable action to secure the proper administration of the temple and its endowments.

Our attention has been drawn to a recent decision by a Bench of this Court (Krishnaswami Ayyangar and Kunhi Raman, JJ.) where a decree settling a scheme for "Sri Vedanayagi Amman Temple and Patasala Trust" was passed (Appeal Suit No. 281 of 1938) in a suit instituted with the consent of the Advocate-General under section 92 of the Code of Civil Procedure and also with the sanction of the Board under section 73 of the Madras Act II of 1927. The trust was there described as a "composite trust" for the *thiruppani* of the temple and the maintenance of the *patasala* at Vedaranyam and no objection was raised, apparently, to the Court's power to settle a scheme for such a trust, for there is no discussion of the question in the judgment of the learned Judges. We cannot therefore regard the case as an authority in point.

In the course of the argument before us reference was frequently made to a *patasala* known as the "Elamaiyakkinar Koil Veda Patasala" situated at Chidambaram. Nothing was said in the plaint about this *patasala* or the properties attached to it nor was any mention made of it at the original hearing of the appeal before us. At the enquiry in the Court below after the remand, questions relating to the *patasala* were sought to be raised by the appellant but the learned District Judge declined to permit him to do so. Mr. Swaminatha Ayyar claimed before us that the *patasala* was a subsidiary charity attached to the suit temple and so came within the scope of this litigation, while the respondents who claim also to be the trustees of the *patasala* maintain that it is an independent trust only named after the deity in the suit temple to distinguish it from other similar institutions at Chidambaram. Obviously, a dispute of this kind cannot be allowed to be raised at this stage and we have not gone into this question. It appears however that there are considerable properties appertaining to this trust, and the respondents admit that the *patasala* has not been functioning for the last about ten years for want of pupils. It seems desirable in such circumstances that the respondents or other persons interested should move the appropriate authorities for directions for the control of the properties and for the use of the income derived therefrom.

In the result, the respondents are directed to invest the capital fund admitted to be in their hands relating to Swaminatha Pillai's *akhanda deepa kattalai* in proper securities in accordance with the directions of the Board which will be applied for within four weeks from this day. Subject to this order the appeal is dismissed. The appellant's costs in both the Courts will come out of the trust estate. The respondents will bear their own costs. A copy of this judgment will be sent to the Hindu Religious Edowments Board for such action as it may think fit to take in the light of our observations.

K.S. ——— *Appeal dismissed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HAPPELL.

S. Devaraja Tharakan .. *Petitioner**

Madras Food Grains Control Order (1945), *sections* 2 *and* 3 *and Defence of India Rules* (1939), *section* 81 (4)—*Possession of grain beyond* 20 *maunds—Conviction and the whole of grain ordered to be confiscated—Order of confiscation justified.*

Where the petitioner found in possession of 50½ maunds of grain and therefore deemed to have stored the grain for purposes of sale, was convicted and the entire quantity of the grain ordered to be confiscated.

Held, that the offence was committed in respect of the whole quantity of the grain and hence the order of confiscation of the whole of the grain was justified as rule 81 (4) of the Defence of India Rules refers to any property with respect to which the Court is satisfied that the order has been contravened and not merely to the property which exceeds that allowed by the law.

* Crl. R. C. No. 828 of 1944. (Crl. R. P. No. 781 of 1944). 5th January, 1945.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session, North Malabar division, in C. A. No. 15 of 1944—C. C. No. 349 of 1944, Joint Magistrate Court, Tellicherry.

C. D. Venkataraman for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner has been convicted of an offence under the Food Grains Control Order and sentenced to pay a fine of Rs. 400. The grain in respect of which the offence was committed was also ordered to be confiscated. The conviction was based on the fact that the petitioner was in possession of 50½ maunds of paddy. Rule 3 (2) of the Food Grains Control Order provides that for the purpose of clause 3 (1) any person who stores food grains in quantities exceeding 50 maunds may, unless the contrary is proved, be deemed to store the grains for purposes of sale. The petitioner was therefore deemed to have stored 50½ maunds of paddy for purposes of sale.

The propriety of the conviction is not now canvassed, but it is argued that the order of confiscation should have been confined only to the paddy in possession of the petitioner in excess of 20 maunds for the reason that storage for sale is not an offence in itself but only storage for sale in wholesale quantities, "storage for sale in wholesale quantities" meaning as defined in rule 2 (e) quantities exceeding 20 maunds. This contention, it is argued, should be accepted in view of the wording of rule 81 (4) of the Defence of India Rules which provides that a Court trying a contravention of an order may direct that any property in respect of which the Court is satisfied that the order has been contravened shall be forfeited to His Majesty. The argument is based on a misconception. Once a person is found to be storing grain for sale in wholesale quantities, he is committing an offence in respect of the whole amount which he is storing and he cannot be heard to say that there is no offence committed in respect of the grain upto 20 maunds but only an offence of the amount in excess of the 20 maunds. The order of confiscation of the whole of the grain was therefore justified.

The petition is dismissed.

V.P.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR JUSTICE CHANDRASEKHARA AIYAR

Shanmughasundaram Pillai .. *Appellant**

v

Parvathi Ammal and another .. *Respondents.*

Hindu Law—Widow—Alienation by one co-widow for necessity—Purchase of the same property in execution by the holder of a simple money decree against the widow as representing her husband's estate—If he can question the validity of the alienation—Alienation made during pendency of appeal in a suit between the co-widows—Plea of lis pendens *if available to the money decree-holder purchaser—Adverse possession of alienee—Not interrupted by application for possession by the purchaser in execution which was subsequently dismissed.*

A Hindu died on 31st October, 1925, leaving two widows *T*, and *D*. *D* set up a deed of settlement in her favour by her husband the genuineness of which was impugned by *T*. Registration of the document was refused by the Sub-Registrar and *D* filed a suit for registration of the document, and obtained a decree before the Sub-Court. On appeal to the High Court the decree was reversed on 4th April, 1933, on a finding that the document was a forgery. During the pendency of the appeal on 13th November, 1929, *D* executed a sale deed in favour of *X* of a house belonging to the estate for consideration and for necessary purposes binding on the estate of the deceased. *T* filed a partition suit in 1934 but before it became ripe for hearing she died in 1936 with the result that the whole estate became vested in *D* as the surviving widow of the deceased. *S*, a creditor of the deceased husband obtained a simple money decree against *D* as representing the estate of her deceased husband and in execution purchased the house (which had already been sold to *X*). When *S* wanted to take possession of the property *X* obstructed him. *S* applied for removal of the obstruction but his application was dismissed and he was referred to a regular suit. In the suit filed by *S* in 1942,

* S. A. No. 1160 of 1944. 29th March, 1945.

Held, (1) An objection that the alienation to *X* even if it was for necessity was invalid because it was an alienation by one only of the two co-widows cannot be raised by *S*. *S* is a stranger and his position is in no way bettered by the fact that he has purchased the property in execution of a money decree. A creditor like *S* could proceed only against the estate of the deceased in the hands of the widow in execution of his decree and if before execution a part of the estate has been alienated by the widow to a stranger for necessity it is not open to him to object to the alienation. The alienation is not void but is only voidable and it can be avoided only at the instance of the co-widow or the reversioner and not by third parties.

(2) The only point for decision in the appeal between *T* and *D* in the High Court was whether the settlement set up by *D* was true or false and there was no right to immoveable property directly and specifically in question in those proceedings, for the doctrine of *lis pendens* to apply. *S* not being a party to those proceedings cannot contend that the alienation was affected by the doctrine of *lis pendens*.

(3) The suit was barred by limitation as it was brought more than 12 years after the date of alienation in favour of *X* though the application for delivery of possession was made within 12 years. While a suit filed under Order 21, rule 63 of the Code of Civil Procedure will arrest the running of time in favour of the person in possession, a mere application for delivery of possession which was dismissed would not have the same effect. It is in no way better than an attachment of the properties at the instance of a creditor and will not stop the running of time against the person in possession.

Appeal against the decree of the Court of the Subordinate Judge, Tanjore in A. S. No. 21 of 1944, preferred against the decree of the Court of the District Munsiff, Tanjore, in O. S. No. 120 of 1942.

K. S. Desikan and *K. Raman* for Appellant.

A, C. Sampath Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal. He purchased the house in question in execution of a small cause decree for money obtained against the second defendant, Dhanalakshmi Ammal, as representing the estate of her deceased husband, Govindaswami Naicker. When he wanted to take possession of the property, the first defendant obstructed him, claiming title under a sale deed executed in her favour by the second defendant on 13th November, 1929. The plaintiff applied for the removal of the obstruction but his application was dismissed and he was referred to a regular suit. Thereupon he filed the suit out of which this second appeal has arisen, claiming that he had a right to the property as against the second defendant. He impeached the sale deed under which the first defendant claimed, as a nominal transaction devoid of consideration, but both the Courts have found that it was a genuine sale deed, supported by necessity.

The Courts below have non-suited the plaintiff on the ground that he is only an auction purchaser of property brought to sale under a money decree against the estate and cannot seek to recover the property from one who claims title under a prior purchase from the widow representing the estate. The District Munsiff also held that the suit was barred by limitation because the suit was filed more than twelve years from the date of the sale deed, Ex. D-2, under which the first defendant claims title. The point as to limitation was not dealt with by the appellate Court.

The original owner Govindaswami died on 31st October, 1925, leaving two widows behind him, Thulasi and Dhanalakshmi (second defendant). Dhanalakshmi set up a deed of settlement in her favour by her husband. Its genuineness was impugned by the other widow, Thulasi Ammal, registration of the document was refused by the Sub-Registrar and thereupon Dhanalakshmi filed a suit for registration of the document. She obtained a decree before the Sub-Court; on appeal to the High Court, this decree was reversed and the document was found to be a forgery. The appeal to the High Court was A.S. No. 18 of 1928 and the judgment in the appeal was on 4th April, 1933. It was during the pendency of this appeal that the sale deed, Ex. D-2, was executed in favour of the first defendant by Dhanalakshmi Ammal, for consideration and for necessary purposes binding on the estate, which is the finding of the Courts below.

Thulasi Ammal filed a suit for partition in 1934, but before it became ripe for hearing she died in 1936, with the result that the whole estate became vested in Dhanalakshmi Ammal as the surviving widow of Govindaswami.

The first contention raised on behalf of the appellant is that the alienation under Ex. D-2 of the suit property is invalid because it was an alienation by one only of two co-widows and is not binding on the estate even if it was for necessity. This is perfectly true. But the person or persons to question such an alienation would be the co-widow, Thulasi, if she was alive, or the reversioner or reversioners of the estate after Thulasi's death. The plaintiff is a stranger and his position is in no way bettered by the fact that he has purchased the property in execution of a money decree. A creditor could proceed only against the estate of the deceased in the hands of the widow in execution of such a decree as we have in this case and, if before execution a part of the estate has been alienated by the widow to a stranger for necessity, it is not open to him to object to the alienation. The alienation is not void but is only voidable and it can be avoided only at the instance of the co-widow or the reversioners and not by third parties. (*Govind Gurunath* v. *Deekappa Mallappa*[1], *Imperial Bank of India, Jullundur* v. *Mst. Maya Devi*[2] and *Ramkumar* v. *Mohanlal*[3].) This ground is therefore not available to the appellant.

Nextly, it was urged that the alienation is affected by the doctrine of *lis pendens* because it was made during the pendency of A. S. No. 18 of 1928, on the file of the High Court in which the properties belonging to the estate were involved. This point too is of no substance because of two reasons. In the first place, the question in A. S. No. 18 of 1928 related only to the genuineness of the deed of settlement. There was no right to immoveable property directly and specifically in question in those proceedings. For the doctrine to apply, the right to specific immoveable property must be directly in issue. Neither the suit O. S. No. 21 of 1926, nor the appeal, A. S. No. 18 of 1928, raised any such question about the property now in dispute. The only point which then arose for decision was whether the deed of settlement set up by Dhanalakshmi Ammal was true or whether it was false. Secondly, what is prohibited by the doctrine is a transfer of property by any party to the suit so as to affect the rights of any other property thereto under any decree or order that may be made. In other words, the transfer would not be valid against the other party to the suit, namely, Thulasi Ammal. But it is not Thulasi Ammal that now questions this alienation, nor any representative of hers. The plaintiff is a purchaser of the property in execution of a money decree against the estate of Govindaswami.

The plea that the suit is barred by limitation, which was upheld by the District Munsiff, was relied on for the respondents. *Prima facie* the suit is barred as it was brought in 1942, more than 12 years after the date of the alienation in first defendant's favour. It is admitted that the first defendant has remained in possession throughout. If the alienation is invalid as is the contention for the appellant, the first defendant's position has been that of a trespasser and she could prescribe for an absolute title on the expiry of twelve years from the date of the sale deed. The difficulty was sought to be got over for the appellant by the argument that, as the appellant's application for delivery of possession was made on 31st October, 1941, within twelve years from the date of the alienation, the suit is within time, as we can hold that it is merely a continuation of the application for delivery. While a suit filed under Order 21, rule 63 of the Code of Civil Procedure will arrest the running of time in favour of the person in possession as held in *Fatima Bibi* v. *Mohamed Usman Sahib*[4], it is difficult to see how a mere application for delivery would have the same effect. It is in no way better than an attachment of properties at the instance of a creditor of the judgment-debtor and it was held in *Dharapuram Janopakara Nidhi, Ltd.* v. *Lakshminarayana*[5] that such an attachment will not interrupt the adverse possession and in that case we had the further circumstance that a claim petition preferred by the respondent, who claimed to be in adverse possession, had been dismissed as belated. There is no authority in support of the view that a mere

---

1. A.I.R. 1938 Bom. 388.
2. (1934) I.L.R. 16 Lah. 714.
3. A.I.R. 1940 Pat. 270.
4. (1943) 1 M.L.J. 212 : I.L.R. (1943) Mad. 696.
5. (1939) 1 M.L.J. 802 : I.L.R. (1939) Mad. 803 (F.B.).

application for delivery of possession against a person in possession which was subsequently dismissed, will stop the running of time. The plaintiff's suit was rightly held to have been barred by limitation.

The result is that the second appeal will stand dismissed with costs of the first respondent. No leave.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

The Panchayat Board, Akumella by its President, Chilakala Peddu Anki Reddi .. *Appellant**

v.

Dubba Yenkata Reddi and another .. *Respondents.*

Specific Relief Act (I of 1877), section 42—Suit by Panchayat Board for declaration that a latrine was vested in it and for injunction restraining defendant from interfering with the work of repair by the Board—If site must be found to have vested in the Board for the grant of relief—Lawful possession of Board—Sufficiency.

In a suit by a Panchayat Board for a declaration that a latrine (which was claimed by the defendants to be erected on their land and used only by their people) was vested in the Board and for an injunction restraining the defendants from interfering with the work of repairs sought to be carried out by the Board, when it is found that the latrine was a public latrine and that the defendants had no right whatever to the property, it is not necessary for the purpose of granting relief against the defendants for the Court to hold that the site had legally vested in the Board. The Board though it is not entitled to a declaration of ownership, is entitled to a declaration that it was in possession and to an injunction restraining the defendants from interfering with its possession.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the High Court dated 9th November, 1944, and passed in S. A. No. 1173 of 1943, preferred against the decree of the Court of the Subordinate Judge, Kurnool, in A. S. No. 23 of 1943, preferred against the decree of the Court of the District Munsiff, Nandyal, in O. S. No. 364 of 1940.

A. C. Sampath Aiyangar for Appellant.

S. Venkatesa Aiyangar and *S. S. Bharadwaj* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the Panchayat Board of Akumella. Within the jurisdiction of the Board is a public latrine used by the women of the village. In 1939 the Board decided to carry out repairs to this and other latrines within its jurisdiction; but as regards the latrine with which the suit is concerned, the Board was obstructed by the respondents, who claimed that the latrine had been erected on land forming part of their private cattle yard and was used merely by their own women folk. The result was that the Board filed a suit in the Court of the District Munsiff of Nandyal for a declaration that the latrine was vested in the Board and for an injunction restraining the defendants from interfering with the work of the repair. The District Munsiff held that the defendants' case was entirely untrue, that the latrine was a public latrine used by the women of the Chinna Bazaar, that the Board had been in possession of the site within the statutory period and that the latrine was vested in the Board. On this basis the declaration and injunction asked for were granted. The District Munsiff's findings were concurred in by the Subordinate Judge of Kurnool, except that he did not consider the question of the vesting of the latrine in the Board. The defendants appealed to this Court. Their appeal was heard by Byers, J., and he allowed it on the ground that the suit did not lie because the Board had been unable to show that the property had vested in it either by statute or by some grant or acquisition. The present appeal is from the judgment of the learned Judge.

We consider that Byers, J., erred in interfering with the decree of the Subordinate Judge. The finding that the latrine was a public latrine used by the women of the village was binding on the learned Judge. It was not necessary for the

* L. P. A. No. 2 of 1945. 16th April, 1945.

purpose of granting relief against the defendants for the Court to hold that the site had legally vested in the Board. The Panchayat Board was in control of the latrine and had properly decided to repair it. The action of the defendants in interfering with this work was the action of trespassers ; and the Board, being in possession, even without a legal title, was entitled to an injunction restraining trespassers from interfering with its possession. In *Ismail Ariff* v. *Mohamed Ghous*[1], the Privy Council held that lawful possession of land was sufficient evidence of right as owner as against a person who was merely a trespasser and that the former could obtain a declaratory decree and an injunction restraining the wrongdoer. The Panchayat Board was not entitled to a declaration of ownership, but it was entitled to a declaration that it was in possession and to an injunction restraining the defendants from interfering with its possession. The defendants had no rights whatever in the property. The Board was carrying out a public duty in looking after this public latrine, and it is entitled to the assistance of the Court. The appeal from the judgment of Byers, J., is allowed and the decree of the Subordinate Judge restored with costs here and in the second appeal.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Minor D. Shanmuga Raja, Zamindar of Sivaganga, a ward under the Court of Wards, represented by the Estate Manager, Diwan Bahadur V. Ponnuswami Pillai .. *Appellant**

v.

Raja Sir S. R. M. M. A. Annamalai Chettiar through agent M. R. Raman Chettiar and others .. *Respondents.*

Madras Local Boards Act (XIV of 1920, *as amended), sections* 3, 80, 81 *and* 88—*Cess apportionment between landholder, sub-landholder and tenants—Payment by sub-landholder to avert attachment—Reimbursement—Suit for recovery of arrears of* poruppu—*Payment of cess as item of deduction.*

Under the scheme of collection provided by the Madras Local Boards Act regarding collection and adjustment of the land cess the annual rent value of the land is the subject of the charge and its incidence, in the case of an estate, is distributed equally between the landholder's interest and the tenant's interest in the land, each paying nine pies in every rupee of the rent value. And where one or more under-tenures have been created in respect of the landholder's interest, the incidence is to be borne, as between the holder and the intermediate landholders in the proportion in which the annual rent value is divided between them. Under the scheme of collection the landholder has to pay to Government in the first instance the whole of the cess payable on the *poruppu* and recover from the tenants one half of the amount so paid. If the landholder fails to pay the cess due from him and the sub-landholder pays it to avert attachment and sale of the lands, the latter has his remedy under section 108 (*g*) of the Transfer of Property Act. There is however no provision in the Act enabling the sub-landholder who pays the full cess payable by his landholder to recover from the tenants half the cess paid. But he can claim to have it as an item of deduction when the landholder sues him to recover arrears of *poruppu.*

Appeals against the decrees of the Court of the Subordinate Judge, Devakottah, in A. S. Nos. 2 to 7 of 1942, respectively preferred against the decrees of the Court of the District Munsiff of Devakottah in O. S. Nos. 160 to 165 of 1940.

K. Kuttikrishna Menon for Appellant.

Sir A. Krishnaswami Aiyar, *K. Umamaheswaram*, *A. Kuppuswami* and *S. Kothandarama Nayanar* (Court-guardian) for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The Zamindar of Sivaganga, the appellant, instituted the suits out of which these appeals arise for recovery of arrears of *poruppu* with interest alleged to be due to him for faslis 1347 and 1348 from the respondents as joint owners of certain villages in the Zamindari granted to their predecessor in title on a permanent cowle on 9th February, 1881. The claim is based on the cowle-deed as modified by a compromise decree made in a prior litigation between the parties. The respondents pleaded, *inter alia*, that they were entitled to a

1. (1893) L.R. 20 I.A. 99 : I.L.R. 20 Cal. 834 (P.C.).

* S. As. Nos. 1155 to 1160 of 1942. 19th April, 1945.

deduction of the cess payable to Government by the appellant as landholder on the *poruppu* due to him, as such cess not having been paid by the appellant was recovered from the respondents. The District Munsiff, Devakottah, who tried the suits disallowed the deduction claimed, as, in his view, the respondents failed to prove that they paid the cess payable by the appellant, and passed a decree for the arrears sued for with interest at 6 per cent. per annum and costs. On appeal, the learned Subordinate Judge of Devakottah held, differing from the trial Court, that inasmuch as the Zamindar admittedly did not pay any part of the cess payable in respect of the villages in question, the entire cess must be taken to have been paid by the respondents who could not have avoided such payment. And, being of opinion that the appellant was liable to pay a proportionate part of the cess calculated on the *poruppu* payable to him, the learned Judge allowed the deduction claimed in each of the suits and modified the decree of the trial Court accordingly.

Two contentions have been raised before us on behalf of the appellant. In the first place, it is argued that after the enactment of the provisions relating to a sub-landholder which were introduced in the Madras Local Boards Act, 1920, by the Amending Act (XI of 1930), the landholder has ceased to be liable for any part of the cess due in respect of the lands held by the sub-landholder who is made liable directly to the Government for the entire cess payable on such lands with a right to reimbursement from the tenants of one half of the cess paid. It is accordingly claimed that the respondents who are admittedly sub-landholders within the meaning of the Act are not entitled to reimbursement against the appellant as landholder in respect of any part of the cess which they might have paid to the Government. And, secondly, the appellant as landholder cannot, in any case, be held liable for more than half the cess payable on the amount of *poruppu* and the respondents are not entitled to a deduction of the full amount of such cess as claimed by them. We are of opinion that both these contentions must fail.

The questions turn entirely on the true effect of certain rather obscurely worded provisions of the Madras Local Boards Act, 1920, as amended by the Madras Local Boards (Amendment) Act, 1930. These provisions may be summarised as follows: Section 3 (9) (21) and (22) define "landholder," "sub-landholder" and "tenant" respectively and, for the purposes of these appeals, the expressions may be taken to refer to the proprietor, the registered holder of an under-tenure and an occupier of land in an estate respectively. Section 78 provides for the levy of land cess on the "annual rent-value" of all occupied lands at the rate of one anna and a half for every rupee of such value. Section 79 lays down rules for fixing the annual rent value of lands held on different tenures, and provides that, in the case of a zamindari estate such as the one here in question, the annual rent payable by the tenants together with any water-rate shall be taken to be the annual rent value of the lands. The District Collector is empowered, under section 80, to require certain landholders and sub-landholders to furnish lists of their lands specifying, in the case of a landholder who has created an under-tenure, the kattubadi, jodi, *poruppu* or quit rent payable to him by the sub-landholder, and, in the case of a sub-landholder, the annual rent value of the lands occupied by him exclusive of the water-rate, if any, payable by his tenants direct to Government, and, under section 81, to assess the landholder or sub-landholder "according to such list." Section 88 provides for payment of land cess by landholders and sub-landholders and reads thus:

"Every landholder and sub-landholder shall pay to the District Collector or other officer empowered by him to receive it, the land cess due in respect of lands held by him exclusive of the amount of such cess, if any, payable by the sub-landholder or landholder, as the case may be, and by the tenant on or before such dates and in such instalments as the district collector under the general orders of the Board of Revenue may, by notification, declare. And if such lands be occupied by a tenant paying water-rate direct the Government, such tenant shall pay to the District Collector together with the water-rate the land cess due on the amount of such water-rate:

Provided that in all cases where a person holds lands with or without a right of occupancy as an intermediate landholder on an under-tenure created, continued, or recognised by a landholder or sub-landholder, it shall be lawful for the landholder or sub-landholder to recover from such intermediate landholder the whole of the cess paid by the landholder or sub-landholder in respect of lands held by

such intermediate landholder less one half the cess assessable on the amount of any kattubadi, jodi, *poruppu* or quit rent, payable by such intermediate landholder to the landholder or sub-landholder :

Provided also that, in the case of lands occupied by tenants, it shall be lawful for the landholder, sub-landholder or any other intermediate landholder, as the case may be, to recover from his tenant one half of the amount payable by such landholder, sub-landholder or intermediate landholder in respect of the lands so occupied."

It will be seen from these provisions that in the case of an estate it is only the landholder or sub-landholder that is made directly liable to pay land cess to the District Collector and not any other intermediate landholder who is not registered as a sub-landholder nor a tenant occupying the lands. This does not, however, mean that the intermediate landholder or the tenant in occupation goes free, for the two provisos make it clear that the landholder or the sub-landholder as the case may be is entitled to collect from the intermediate landholder the whole cess paid by him less half the cess assessable on the amount of the kattubadi, etc., payable by such intermediate landholder, and, where there is no such intermediate landholder, from the tenants one half of the amount payable by such landholder or sub-landholder. The intermediate landholder who has to pay the cess to the landholder or the sub-landholder is also similarly entitled to collect from the tenants one half of the amount payable by him. In other words, under the scheme of assessment, collection and adjustment of the land cess provided for under the Act, the annual rent value of the land is the subject of the charge, and its incidence, in the case of an estate, is distributed equally between the landholder's interest and the tenant's interest in the land, each paying nine pies in every rupee of the rent value ; and, where one or more under-tenures have been created in respect of the landholder's interest, the incidence is to be borne, as between the landholder and the intermediate landholders in the proportion in which the annual rent value is divided between them. But it is only the landholder and the intermediate landholder who is registered as a "sub-landholder" in the office of the District Collector that are brought into direct relation with Government for purposes of assessment and recovery of the cess, that is to say, each of them has to pay to Government 18 pies in every rupee of the annual rent value derived by him from the land and recover from the tenants 9 pies for every rupee on which he has paid the cess. The position may be illustrated by slightly modifying the old illustration to section 88 which was removed by the amending Act of 1930. A sub-landholder is entitled to receive from his tenants Rs. 500 as the annual rent on 100 acres of land. The sub-landholder has to pay the landholder Rs. 50 as kattubadi, jodi, *poruppu* or quit rent. The landholder has to pay to the Collector Rs. 4-11-0 on Rs. 50 and the sub-landholder has to pay Rs. 42-3-0 on Rs. 450, and they can recover Rs. 2-5-6 and Rs. 21-1-6 respectively from the tenants who have to bear half the land cess on Rs. 500, *viz.*, Rs. 23-7-0.

It is argued for the appellant that, inasmuch as the sub-landholder is required under section 80 (2) (*b*) to specify in the list of lands to be furnished by him the annual rent value of the lands occupied by him and the Collector has under section 81 to assess the tax "according to such list," the sub-landholder is liable for the entire cess and the landholder is under no liability to pay any part of it. This contention overlooks that the landholder is required under section 80 (2) (*a*) (1) to specify in the list to be furnished by him to the Collector the kattubadi, etc., payable to him by a sub-landholder, and he has to be assessed by the Collector, under section 81 according to such list, just as the sub-landholder, is to be assessed according to the list furnished by the latter ; while section 88 provides that every landholder and sub-landholder shall pay to the Collector the land cess due in respect of the lands held by him exclusive of the amount of such cess, if any, payable by the sub-landholder or landholder as the case may be. These provisions clearly indicate that the landholder is directly responsible to pay the land cess to the District Collector on the kattubadi or *poruppu* payable to him by the sub-landholder, and the absence of any provision in section 88 for reimbursement of the latter in respect of such cess also points to the same conclusion. If, however, the landholder fails to pay the cess due from him and the sub-landholder pays it to avert attachment and sale of the lands, the latter has his remedy under section 108 (*g*) of the Transfer of

Property Act which entitles a lessee to make any payment due from the lessor and recoverable against the property and deduct it with interest from the rent. It is under this provision that the respondents claim the deduction now in question.

The appellant next contends that the respondents are not entitled to a deduction of the full cess payable on the kattubadi or *poruppu* as one half of such cess is to be borne by the tenants. It is true that, in its ultimate incidence, the burden of such cess has to be shared equally between the landholder and the tenants. But, as pointed out already, under the scheme of collection and adjustment laid down in the Act, the landholder has to pay to Government in the first instance the whole of the cess payable on the *poruppu* and recover from the tenants one half of the amount so paid. There is, however, no provision in the Act enabling the sub-landholder who pays the full cess payable by the landholder to recover from the tenants half the cess paid. The respondents will thus have no means of reimbursing themselves in full if they are not allowed the deduction as now claimed by them. There is nothing to show that they have recovered from the tenants anything more than one half of the amount payable by themselves, that is on the annual rent value of the lands less the *poruppu* payable to the appellant.

The decrees of the Court below are, therefore, affirmed and these appeals are dismissed with costs.

B.V.V. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Srinivasa Tholappachar .. *Appellant**

v.

K. Seshagiri Rao, Sale Officer to the Co-operative Societies at Bellary .. *Respondent.*

Madras Co-operative Societies Act (VI of 1932)—Sale officer executing award under, postponing the sale—Acts judicially and is entitled to the protection of Judicial Officers Protection Act (XVIII of 1850).

The sale officer executing an award under the Madras Co-operative Societies Act, in ordering an adjournment of a sale acts judicially and is entitled to the protection of the Judicial Officers Protection Act. The fact that his order is not appealable does not turn it, from a judicial act, into an administration act.

Decision of Chandrasekhara Ayyar, J., affirmed.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Chandrasekhara Aiyar, J., dated 5th January, 1945, and passed in S. A. No. 321 of 1944 preferred against the decree of the District Court, Bellary, in A. S. No. 81 of 1943 (O. S. No. 151 of 1942, District Munsiff Court, Hospet).

B. V. Ramanarasu for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal from a judgment of Chandrasekhara Aiyar, J., under clause 15 of the Letters Patent. The appellant has lost in all the three Courts below and we see no reason why he should succeed here.

The appellant is the owner of land in the Bellary district. He leased it to one Ayyaswami Pillai for the purpose of sugarcane cultivation. The lessee was a member of the Hospet Sugarcane Growers Co-operative Society and was indebted to the society. An award was passed against him under the provisions of the Madras Co-operative Societies Act, 1932, and in execution of the award the Co-operative Society attached the crop on the land leased to Ayyaswami Pillai. The date of the attachment was the 19th March, 1941. At the time of the attachment a sugarcane crop was growing on the land. The award was forwarded to the sale officer of the Co-operative Department for the purpose of execution. On the 25th March, 1941, in the execution proceedings, the appellant had claimed, as the landlord, to be entitled to priority in the sum of Rs. 429 in respect of the rent due. His claim was investigated by the sale officer and allowed by an order dated the

* L. P. A. No. 16 of 1945. 17th July, 1945.

7th April, 1941. The sale officer had fixed the sale for the 8th April, 1941. On that date he passed an order adjourning it until the 21st April, 1941. The appellant says that the postponement was unlawful and that as the result of the postponement the crop could not be gathered in time. Consequently it was ruined. The appellant filed a suit in the Court of the District Munsiff of Hospet against the Co-operative Society and the sale officer. He claimed Rs. 1,268 against both defendants. The District Munsiff dismissed the suit as against the second defendant and his decision was upheld by the District Judge of Bellary on first appeal. It was also upheld by Chandrasekhara Aiyar, J., on second appeal.

The case against the sale officer who was the second defendant and is the only respondent in this appeal, is that he acted wrongfully in postponing the sale and it is said by the appellant that consequently he is liable to him in the sum of Rs. 429 as damages, this sum representing the value of the crop which was lost. The District Munsiff dismissed the suit against the sale officer on the ground that he had not been sued as such. The District Judge confirmed the decision on the ground that the sale officer, in ordering the postponement of the sale, was acting in a judicial capacity and consequently was entitled to the protection given by the Judicial Officers Protection Act, 1850. Chandrasekhara Aiyar, J., agreed with the District Judge. The sole question in the appeal is whether the sale officer was acting judicially or merely in an administrative capacity. It is common ground that if he was acting judicially he is entitled to the protection of the Act.

Rules have been framed under the Madras Co-operative Societies Act and they provide for the execution of awards. The officer appointed to execute the award is the sale officer, who is defined in the rules as meaning an officer of the Co-operative department empowered by the Registrar by general or special order to attach and sell the property of defaulters. The tenant was the defaulter and it was the duty of the respondent to execute the award which had been passed against him. Rule 22 (4) (*i*) states that the Registrar of the District or the sale officer may, in his discretion, adjourn a sale to a specified day and hour, recording his reasons for such adjournment. Where a sale is so adjourned for a longer period than seven days, a fresh proclamation under clause (*h*) must be made, unless the judgment-debtor consents to waive it. Section 57-B states that the Registrar or a person empowered by him in that behalf shall be deemed, when exercising powers under the Act for the recovery of an amount by the attachment and sale or by the sale without attachment of property, or when passing orders on an application made to him for recovery or to take some step in aid of recovery, to be a Civil Court for the purpose of Article 182 of the First Schedule to the Indian Limitation Act.

There were here proceedings in execution analogous to proceedings in execution under the Code of Civil Procedure and if the Registrar of the district had passed an order directing the postponement of this sale, there could be no doubt that he would have been acting in a judicial capacity. The sale officer is given equal power of ordering an adjournment and he exercised this power in execution proceedings regularly instituted. We can see no difference between the exercise of the power by the Registrar and the exercise of the power by the sale officer. The fact that the order is not appealable does not turn it from a judicial act, into an administrative act. There are orders contemplated by the Code of Civil Procedure which are judicial orders and which are not appealable.

Agreeing with the judgment of the District Judge and that of Chandrasekhara Aiyar, J., we hold that the sale officer acted judicially in passing the order for the postponement of the sale and that consequently he is entitled to the protection of the Act.

The appeal is dismissed with costs.

K.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh.)

PRESENT :—LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Musammat Inder Kuer .. *Appellant**

v.

Musammat Pirthipal Kuer and another .. *Respondents.*

Hindu Law—Joint family—Partition—Essentials—Conduct of family and attendant circumstances—Sufficiency to prove separation.

Though there is no evidence of actual partition of the joint estate by metes and bounds there can still be a partition as physical division of property is not necessary. Once the shares are defined there is a severance of joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforward the parties hold as tenants in common.

It is well established that separation of family can be proved by the conduct of the family and the attendant circumstances.

J. M. Pringle for Appellant.

C. S. Rewcastle and *L. M. Joplong* for Respondents.

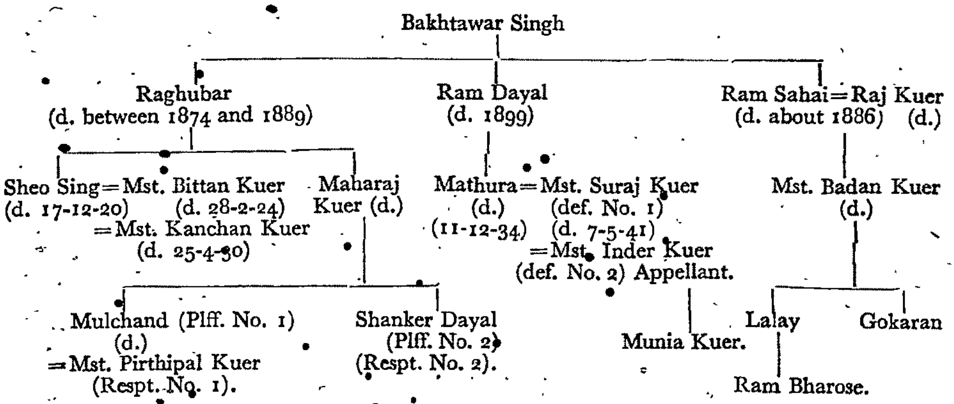
Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from the decree of the Chief Court of Oudh dated 27th February, 1940, which reversed the decree of the Civil Judge, Sitapur, dated 30th September, 1936, and decreed the plaintiff's suit.

The appellant before the Board was the second defendant in the suit, the surviving widow of one Mathura Singh, deceased. The first and the only other defendant, her co-widow, did not join the appellant in filing this appeal. She was therefore made the third respondent. During the pendency of the appeal she died and her name was removed; and the appellant was made her heir and legal representative by the order of the Chief Court.

The deceased husband of respondent No. 1 and respondent No. 2 were the original plaintiffs in the suit. They will be referred to as the respondents.

The relationship of the parties to the suit is shown in the following genealogical table :



One Bakhtawar Singh, a Hindu, had three sons, Raghubar, Ram Dayal and Ram Sahai. Of these Raghubar and Ram Dayal had each one son called respectively, Sheo Singh and Mathura Singh; and Raghubar had a daughter as well, whose sons were the plaintiffs in the suit. Sheo Singh died on the 17th December, 1920, without issue leaving two widows Musammat Bittan Kuer, who died on 28th February, 1924, and Musammat Kanchan Kuer, who died on 25th April, 1930.

---

* P. C. A. No. 3 of 1943. 7th May, 1945.

Mathura Singh, the cousin of Sheo Singh, died on 11th December, 1934, leaving two widows—the defendants in the suit—of whom the surviving widow, the second defendant is, as was stated before, the appellant.

The appeal arises out of a suit instituted by the respondents for possession of the immoveable properties mentioned in lists A and B of the plaint, under claim of being the heirs of Sheo Singh, the last full owner. They claimed the properties as Sheo Singh's separate estate, to which they as his sister's sons were entitled to succeed by virtue of section 2 of the Hindu Law of Inheritance (Amendment) Act (II of 1929) (hereinafter referred to as "the Act"). The Act applies to persons otherwise subject to the Law of the Mitakshara. Section 2 of the Act says that :

"A son's daughter, daughter's daughter, sister and sister's son shall in the order so specified be entitled to rank in the order of succession next after a father's father and before a father's brother."

It will be observed that Mathura Singh, as the son of Sheo Singh's father's brother and ranking as such in the Mithakshara order of succession would, under the section, be postponed to the plaintiffs as sister's sons of Sheo Singh. The case of the respondents is that after the death of Sheo Singh, his widows Bittan Kuer and Kanchan Kuer, entered into joint possession of Sheo Singh's property, that on Bittan Kuer's death, Kanchan Kuer came into possession of the entire property, that on her death Mathura Singh took wrongful possession of the same and that on his death his widows obtained wrongful possession against them.

The appellant and her co-widow resisted the claim of the respondents on the alternative contentions, *viz.*, (1) that the properties in suit were joint family properties which on Sheo Singh's death in 1920 passed by survivorship to their husband, and on his death in 1934, to themselves for a limited estate, and the appellant claims that on her co-widow's death they vested in herself alone ; and (2) that even if the properties were the separate properties of Sheo Singh, under the custom applicable to the family, Mathura Singh took as heir, the operation of section 2 of the Act being excluded by section 3 thereof. Section 3 is as follows :

"Nothing in the Act shall (*a*) affect any special family or local custom having the force of law."

The custom relied on by the appellant and her co-widow is thus stated in para. 21 of their joint written statement :

"It has been the custom in the family of Bakhtawar Singh and his descendants that in the presence of collaterals, daughters, their sons, or sisters and their sons, are excluded from inheritance. If there be no collateral then daughters, their issue, and after that sisters and their descendants become heirs."

On the above contentions two questions arose for decision in the Courts in India, and the same questions arise for decision also before the Board. These questions are : (1) Whether Sheo Singh and Mathura Singh were members of a joint Hindu family or whether Sheo Singh died while separate from Mathura Singh and (2) whether there is any custom in the family of Sheo Singh excluding sisters and their issue if collaterals are in existence.

In support of their respective contentions both parties gave evidence, both oral and documentary, on a consideration of which the learned Civil Judge answered both questions in favour of the appellant ; the learned Judges of the High Court set aside his decision on both points.

As is usual in cases of this kind, the oral evidence is much interested and indefinite, and the documents by themselves are inconclusive. The case has to be decided on the evidence read as a whole. The burden of proving that Sheo Singh was separate in estate from Mathura Singh is on the respondents. It is well known that the estate of every Hindu family is presumed to be joint, joint in food, worship and estate ; but the strength of the presumption necessarily varies in each case. It has been laid down that the presumption of union is stronger in the case of brothers than in the case of cousins, and the further you go from the founder of the family, the presumption becomes weaker and weaker. The evidence in the case has to be reviewed in the light of this presumption. Sheo Singh and Mathura Singh, being cousins, the presumption of jointness may not be so strong as it would be had they been brothers.

The respondents have not been able to assign any definite date as regards the partition in the family of their uncle. They are only nephews of Sheo Singh who ordinarily may not be expected to know the details of his family affairs, though according to the evidence they had lived long in their uncle's family. Their counsel stated (see page 13 of the records) :

"Raghubar Singh, Ram Sahai, and Ram Dayal were separate. My client cannot give the date when separation took place, but it took place when the sons of Bakhtawar Singh were alive. The separation took place some time between the first regular settlement and the death of Ram Sahai. Raghubar was separate from before."

The settlement referred to is 1873, and Ram Sahai died in or about 1886. There is some evidence, not direct, bearing on the point, but it is not sufficient by itself to establish the truth of the counsel's statement. Their Lordships will refer to it later. In this connection it is necessary to observe that though the respondents may not be able to prove the exact case of separation set up by them in their counsel's statement, they will be entitled to succeed in their case if they are able to prove to the satisfaction of the Court that Sheo Singh and Mathura Singh must have been separate in estate and that Sheo Singh died while separate from Mathura Singh, which is what they have really attempted to do, relying on the evidence read as a whole to support that conclusion inferentially.

Their Lordships will first deal with the question whether Sheo Singh died while separate from Mathura Singh. After holding that separate devolution of shares in the properties, specification separately of the shares of Sheo Singh and Mathura Singh in the Khewats, the fact that they held *sir, khudkasht* lands separately, that they held groves separately, that they had separate residences, that they executed separate powers of attorney and had separate servants and other factors, relied on by the respondents to show that Sheo Singh and Mathura Singh were separate in estate, were not necessarily inconsistent with the existence of a joint Hindu family, the learned Civil Judge concluded that the family was joint chiefly by reason of (1) the evidence of Musammat Suraj Kuer, defendant No. 1, taken on commission, (2) the evidence afforded by certain books of accounts, Exhibits A-37 to A-40, and (3) the evidence that the income of the entire estate was collected by Sheo Singh alone in his lifetime. In support of the conclusion that the family was joint and was not divided Mr. Pringle, the learned counsel for the appellant, has taken their Lordships through most of the evidence in the case. Their Lordships will refer only to those salient features in the evidence which they think are sufficient to decide the point under consideration and will deal with the relevant objections thereto as they proceed.

In their Lordships' opinion evidence relating to devolution of properties in separate shares where such devolution happened, and the holding and management of properties in separate shares, are the most important evidence in this case on the question of separation. When Ram Sahai, one of the three sons of Bakhtawar, died in or about the year 1886, evidence shows that in two villages, his share was mutated in the name of his widow Raj Kuer to the exclusion of his brothers (*see* Exhibits 22 and 25). Exhibit 22 shows that she was also the lambardar of the village of Badhwa. It is said that these shares came back to the family but it is not shown in what circumstances. However, to the extent they go these documents would suggest that there may well have been a separation of shares before the death of Ram Sahai. It is not known whether Raj Kuer obtained the shares of her husband in the other three villages in which also he had shares. The learned Judges of the High Court say that all his property was mutated in the name of his widow but the evidence on record refers only to the abovementioned two villages. Their Lordships agree that this evidence by itself is not enough to establish the case of separation set up, but it requires explanation, and Mr. Pringle explains it by saying that the shares in question were given to her by way of consolation to the widow on the death of her husband. The learned Judges of the High Court say with reference to the plea that:

"It is well established that there is no presumption that mutation in the name of a Hindu widow is by way of consolation. Consequently whoever raises the plea of mutation being for consolation

must prove it but in the present case there is no evidence worth the name in support of the defendants' allegation on this point."

This view has not been shown to be wrong. The learned Judges say further, that

"the fact that Ram Sahai's and Sheo Singh's widows were lambardars in some of the villages knocks the bottom out of the plea of consolation."

The next instance of mutation to be noticed is the one that followed on the death of Sheo Singh, who died in 1920. The following extract is from the learned Civil Judge's judgment:

"The shares of the property of Sheo Singh and Mathura Singh were separately recorded in the khewats, and after the death of Sheo Singh his property was separately recorded in the names of his widows as appears from the khewats and khetonis (Exs. 27 to 34 and 37 to 39). The widows of Sheo Singh were also made Lambardars of their share of the property (*vide* D. W. 10, page 57)."

This instance of mutation strongly supports the view that Sheo Singh before his death must have become separate in estate from Mathura Singh, for, if they were joint, mutation would in the normal course be in the name of Mathura Singh and not in the name of the widows. In this connection the High Court observes that:

"the order of mutation having been passed by the Tahsildar shows that Mathura Singh did not even contest the widows' right to succeed to their husband."

Ex. 17 shows that on Bittan Kuer's death the property standing in her name in village Tambour was mutated in favour of the surviving widow Kanchan Kuer, as stated by the Tahsildar "on the basis of inheritance." The mutation made in favour of the widow in the case of Sheo Singh's death also is said to have been made by way of consolation without any proof that it had been so made. If that had been so made originally, on Bittan Kuer's death, why should her portion be mutated again in favour of Kanchan Kuer who had been given her specific portion already? An order made in mutation proceedings is, no doubt, not a judicial determination of the title of the parties, but that it has evidentiary value cannot be disputed. It appears to their Lordships that the true explanation of what happened, is this, that when their husband died the two widows succeeded to his estate as they would ordinarily do under the Hindu law, and when one of them died, the other succeeded to the ordinary widow's estate in the whole of it, from which it would follow in the absence of a reasonable explanation that their husband died while separate from Mathura Singh. This is the real evidentiary value of the mutation proceedings in this case, and the learned counsel who has gone through the evidence with great care has not been able to give any satisfactory explanation of them except that the properties were given by way of consolation to the widows which is true neither in law nor in fact. The instances of succession which their Lordships have noticed are clearly inconsistent with the family being joint. Further, in several villages the widows were lambardars. They had separate servants for collection of rents and they filed suits for arrears of rents even in a village of which Mathura Singh was the lambardar. These facts are full of significance and support the view that Sheo Singh was separate from Mathura Singh before he died.

The above evidence does not stand alone. Another kind of evidence relates to the holding of the lands. There is evidence not only that the shares of Sheo Singh and Mathura Singh were specified in several khewats but also they held *sir*, *khudkhast* lands and groves separately. It is true that there is no evidence in this case of actual partition of the joint estate by metes and bounds, but physical division of property is not necessary.

"Once the shares are defined there is a severance of joint status. The parties may then make a physical division of the property or they may decide to live together and enjoy the property in common. But the property ceases to be joint immediately the shares are defined and thenceforward the parties hold as tenants in common." (See the decision of the Board in *Harkishan Singh* v. *Partap Singh*[1].)

The other relevant evidence indicative of separation such as, having separate residence, separate business, separate servants, separate cattle sheds, and others of a like nature which are important, have all been fully considered in the judgment of the High Court and need not be referred to again. It is well established that

1. (1938) 2 M.L.J. 234 : 42 C.W.N. 1021 (P.C.).

separation of family can be proved by the conduct of the family and the attendant circumstances; and their Lordships are of opinion that in this case there are strong circumstances proving the separation of the family.

The cumulative effect of the evidence examined above is sought to be negatived mainly by referring to entries in the account books, A-37 to A-40, for the years 1914-15, 1915-17, 1918-20, and 1920-23, respectively, to show that the family remained joint. Their Lordships are not satisfied after an examination of the various entries brought to their notice that the account books represent accounts of the joint family; on the other hand they agree with the High Court that the evidence gives strength to the respondents' case that the accounts are the separate accounts of Sheo Singh. They may add that there is nothing in the evidence to show from what source the monies dealt with in the accounts came. The other documents brought to their Lordships' notice, such as A-2, A-42, A-43, A-45, are not for the reasons mentioned by the learned Judges necessarily inconsistent with the respondents' case. The evidence of the first defendant, the co-widow, taken on commission, distinctly supports the case of the plaintiff, that Sheo Singh and Mathura Singh were separate. Their Lordships do not attach much importance to the evidence that Sheo Singh collected the rent and paid the revenue on behalf of the co-sharers as he was the lambardar of many of the villages.

In their Lordships' opinion the evidence surveyed as a whole including the oral evidence leads to the conclusion that the separation of estate in this family began from about the time of Ram Dayal's death and went on progressively till it culminated in effective separation between Sheo Singh and Mathura Singh before the death of Sheo Singh, and that Sheo Singh died while separate from Mathura Singh. It is difficult to ascertain definitely the date when the separation took place but that is not a defect as their Lordships are satisfied from the evidence that it did take place before the death of Sheo Singh. The learned counsel for the respondents states that the separation took place at or about the year 1900, judging from the entry in column 3, headed period of cultivation, "20 years from 1309 Fasli" noted against Thakur Sheo Singh, "proprietor," in Ex. 27, an extract from the Khetauni of village Tambur, but it is difficult having regard to the nature of the evidence to assign any exact date, nor is it necessary to do so in the circumstances of this case.

In view of the finding that Sheo Singh died while separate from Mathura Singh, the appellant cannot succeed unless the alleged custom of exclusion of sisters and their children by collaterals is established, which is the next question for consideration. In support of this custom the appellant and her co-widow relied in the Courts below mainly on the *wajib-ul-arz* of Isapur village—Ex. 41, dated 1873. Para. 4 of the *wajib-ul-arz* runs as follows:

"The custom obtaining in the family of the Zamindars of this village is that on the death of any co-sharer, if there be any male issue and widow, the male issue gets the heritage in equal shares and the widow, food and raiment . . . . If there be no male issue, the real brothers shall be the heirs, generation after generation, and shall support the widow. If even real brothers be not in existence, then the widow shall remain the heir for life. If there be two or more widows, they shall be the owners in equal shares. In the event of the widow becoming immoral, she shall be deprived of the share. If there be no widow even, then the nearest among the collateral relations if the widow's husband shall get the share and if even he be not forthcoming, then the daughter and her issue and sister and sister's issue shall be the heirs."

The *wajib-ul-arz* has been attested by Ram Sahai, Raghubar Singh, Ram Dayal and other co-sharers of the village. The learned Judges held that the above paragraph of the *wajib-ul-arz* can hardly be taken as a custom for the reasons that, (1) on Ram Sahai's death his property devolved on Raj Kuer, and not on his brother Ram Dayal, (2) *wajib-ul-arz* are often untrustworthy as they record not custom but the wishes of those who dictate them, (3) in the present case there is no satisfactory evidence that the clause records a custom, (4) none of the witnesses examined could cite a single instance of the application of the custom and (5) it is difficult to see how there could have been a custom of exclusion of sisters when sisters were no heirs at all prior to the passing of Act II of 1929. The learned Judges had before them

another *wajib-ul-arz*—Ex. A-2—"which contained no such provision relating to the succession of sisters as is contained in the *wajib-ul-arz* of Isapur." They, therefore, held that the custom set up was not proved.

The printed records show that Ex. A-2 is a translation of an extract from the *wajib-ul-arz* of the village Ismailganj, in which also, the predecessors of the parties were co-sharers, containing only paras. 1, 3, 13 of the *wajib-ul-arz*. The extract is a certified copy issued by the copying department of the Sitapur Collectorate. It does not contain para. 4 of the *wajib-ul arz* or any reference to the alleged custom.

A translation of the original *wajib-ul-arz* of Ismailganj containing all the paragraphs has now been brought to their Lordships' notice by the respondents, included in the "supplementary record." It contains para. 4 of the *wajib-ul-arz* styled "relating to right of inheritance." Normally their Lordships will not at this stage take this document into consideration, without having the question of its admission considered by the High Court, but the appellant's learned Counsel, though, he objected to the manner in which it has been brought to their notice without the usual formal application for admission of the document, has agreed that he has no objection to their Lordships treating it as admitted. Their Lordships are surprised that the learned Judges of the High Court were led to think that there was no reference to the right of inheritance in the *wajib-ul-arz* of Ismailganj. The trial Court does not in this connection refer to this exhibit. Paragraph 4 "relating to inheritance" of this *wajib-ul-arz* runs as follows:

"'A daughter' and her issue are not entitled to inheritance and a childless widow whose husband's share was separate and whose husband used to get rendition of accounts only, is entitled to inheritance and possesses powers of transfer also. In case the share is divided but no rendition of account is made she (the widow) holds the share without power of transfer and after her that share devolves on the lawful heir. In case there are male "issue from several wives, then division of share takes place on the number of wives. A woman who is not lawfully wedded and her issue have no right whatsoever. She gets maintenance (food and raiment) as long as she remains alive." (The res of the paragraph omitted refers to the custom of adoption; and of the rights of an adopted son and the son born after adoption.)"

The above paragraph does not contain any reference to inheritance by sisters and their sons at all, and in that respect is not in conformity with the custom contained in paragraph 4 of the *wajib-ul arz* of Isapur, which excludes sisters and their children in the presence of collaterals. As already stated the predecessors of the parties to the suit were co-sharers in both the villages. In an appropriate case like the present what is the rule of inheritance to be applied according to the custom of the family? In view of the inconsistent statements contained in these two documents as regards the right of inheritance their Lordships hold without any further consideration of the question which seems to them to be unnecessary in the circumstances, that the alleged custom set up by the appellant and her co-widow has not been established. In the result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Ramanatha Mannadiar ... *Petitioner**

v.

T. K. Ramaswami Iyer ... *Respondent.*

Legal Practitioner—Pleader—When can be permitted to appear against his former client or his representatives in interest in the same suit—Civil Rules of Practice (Madras), Rule 20, proviso—Applicability.

The discretion to permit a pleader who has acted for one party to act for another in the same suit vests in the Court.

X was a creditor of the tavazhi of *Y* and others. He obtained a money decree and in execution thereof purchased for a portion of the decree amount the properties in the possession of the tavazhi. He attached subsequently the further interest of the tavazhi in the tarwad. In a partition suit relating to the tarwad, *X* was impleaded as an alienee but long prior to the passing of the preliminary decree an arrangement had been entered into between *Y* as representing the tavazhi and *X* whereby *X* surren-

* C. R. P. No. 1776 of 1944. 16th March, 1945.

dered to the tavazhi the properties purchased by him in the Court sale and in consideration thereof the entire interest of the tarwad properties was mortgaged to *X* who then ceased to have any interest in the suit except to watch his mortgage interest. *X* then assigned his mortgage interest to *R* who in turn assigned it to the sub-tavazhi of *Y*. *Y* and his tavazhi did not employ the services of *X's* pleader who was approached by the plaintiffs with a vakalat. *X* gave a letter in writing permitting the vakil to appear for the plaintiffs. The vakil applied to the Court for permission to appear for the plaintiff. *Y* objected.

Held that, in the circumstances, the proviso to Rule 20 of the Civil Rules of Practice applied to the case and the express consent of *X* and the implied consent of his representatives in interest was sufficient to enable the vakil to appear for the plaintiffs and the Court can in its discretion grant him permission to do so.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, South Malabar at Palghat, dated 5th September, 1944, in I.A. No. 558 of 1944 in O. S. No. 114 of 1933.

P. A. Krishnakutti Nair for Petitioner.

C. K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise the order of the Subordinate Judge of Palghat granting permission to the respondent vakil who was appearing and acting for the 215th defendant in O. S. No. 114 of 1933, on his file to accept the vakalat and act for the plaintiffs in the said suit. The petitioner herein is the 51st defendant in the suit and he is the manager of one of three tavazhies, constituting the tarwad. The objection of the petitioner to the order under revision is that the learned Subordinate Judge exercised a jurisdiction vested in him with material irregularity. It is contended for the petitioner that there is a conflict between the case of the 215th defendant and his representatives in interest.

The general principle with regard to the appearance of counsel for two clients whose interests may conflict is set out in "Halsbury's Laws of England" (Hailsham's edition), Volume II, at page 532. It is stated there that where interests of two clients may conflict, counsel ought not to appear for both of them. Likewise, counsel ought not to accept a brief against a party even though the party refused to retain him in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party. At page 534 of the same volume occurs the following passage :

"Counsel who has drawn pleadings or advised or accepted a brief during the progress of an action on behalf of any party ought not to accept a retainer or brief from any other party without giving the party for whom he has drawn pleadings, or whom he has advised, or on whose behalf he has accepted a brief, the opportunity of delivering a brief to him."

Although the general position is as stated above, it is principally a matter of professional ethics, and so far as this province is concerned, the matter is regulated by Rule 20 of the Civil Rules of Practice. That rule while prohibiting a pleader who has drawn pleadings in connection with a suit or who has acted for a party in any such suit from appearing therein for any person whose interest is opposed to that of his former client provides expressly that he may so appear " when specially authorised by the Court, or by consent of the party." The proviso to that rule says that the consent of the party shall be presumed if he engages another pleader to appear for him in such suit without offering an engagement to the pleader whose services he originally engaged. The scope and purpose of this exception has been set out by a Bench of this Court in *Veerappa Chettiar* v. *Sundaresa Sastrigal*[1] in these words :

" . . . .in order to prevent an unscrupulous or cantankerous client from depriving his opponent of the services of pleaders, Rule 277 of the Civil Rules of Practice gives a discretion to the Court to specially authorise a pleader to appear and act for a party whose interests are opposed to those of the party for whom he at one time acted or appeared or gave advice."

It is manifest that the discretion to permit a pleader who has acted for one party to act for another in the same suit vests in the Court. The question therefore is whether that discretion was not properly exercised in this case. The facts are these. The 215th defendant was not a member of the tarwad. He was a creditor of the

1. (1925) 49 M.L.J. 366 : I.L.R. 48 Mad. 676 at 687.

tavazhi of the 51st defendant and others. He obtained a money decree and in execution thereof he purchased in Court auction for a portion of the decree amount the properties in the possession of the tavazhi. He attached subsequently the further interests of the tavazhi in the tarwad. He was impleaded in O. S. No. 114 of 1933 as an alienee, and one of his main defences in the suit was that in any event he had effected substantial improvements at an expense of about Rs. 20,000, and that he was entitled to the value thereof. The preliminary decree was passed by the Sub-Court on 28th December, 1939, on the basis that the Razi decree passed in O. S. No. 37 of 1887, amounted to a partition between the three branches. There was an appeal to the High Court in which it was decided by a judgment dated 14th September, 1943, that the suit decree did not amount to partition but only to a maintenance arrangement and consequently the suit was remanded to the Sub-Court for proper disposal. Long prior to the passing of the preliminary decree, *i.e.*, on 30th May, 1937, an arrangement had been entered into between the tavazhi represented by the petitioner and the 215th defendant whereby the latter had surrendered to the tavazhi the properties purchased by him in the Court sale and in consideration thereof, the entire interest of the tarwad properties was mortgaged to the 215th defendant for a sum of Rs. 8,250. This arrangement was reported to the Sub-Court through I. A. No. 1165 of 1939 and was recorded. Virtually therefore from May 1937 the 215th defendant ceased to have any interest in the suit except to watch his mortgage interest. Subsequent to the arrangement, the said 215th defendant assigned the mortgage to one K. S. Ramachandra Iyer in July, 1940, who in turn assigned it in 1941 to the sub-tavazhi of the 51st defendant. Thus it will appear that from 1937 onwards it was open to the petitioner and his tavazhi, if they wanted, to employ the services of the respondent vakil, but they did not choose to do so. They did not do so even after the case had been remanded by the High Court and was taken up for enquiry. The tavazhi represented by the 51st defendant had not in their pleadings set up any claim for improvements until the disputes between the tavazhi and the 215th defendant were settled. In this state of affairs, the plaintiffs approached the respondent vakil with a vakalat on 16th June, 1944. The 215th defendant was asked if he had any objection, and he gave a letter in writing permitting the vakil to appear for the plaintiffs. In these circumstances, the vakil was entitled to presume that the petitioner's tavazhi did not require his services. He accepted the plaintiffs' vakalat on 2nd July, 1944, subject to the sanction of the Court and promptly applied to the Court for permission on 5th July, 1944. The learned Subordinate Judge questioned the petitioner in Court whether the tavazhi was intending to utilise the services of the vakil, and he stated that he did not intend to appoint him as his vakil since he had already accepted the plaintiffs' vakalat.

Upon the above mentioned facts, it is plain that the proviso to Rule 20 of the Civil Rules of Practice applies, and that the express consent of the 215th defendant and the implied consent of his representatives in interest was sufficient to enable the vakil to appear for the plaintiffs. But he took the precaution of applying to the Court and obtaining the Court's permission also. The Court upon these facts was entitled to grant the permission and it was certainly not an improper exercise of the discretion.

The only other ground that is emphasised is that there is a conflict of interest between both parties particularly on the question of improvements. The vakil in his counter affidavit filed in the application for stay made in this Court says that he has seen no documents on the question of improvements and that there are no such documents in existence. He also states that he received no instructions from the 215th defendant after May 1937 except to get the arrangement recorded. In the reply affidavit filed there is no refutation of these statements.

In these circumstances I see no reason to interfere with the order passed by the Subordinate Judge. The revision petition is dismissed with costs.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KING.

Nayar Varada Pillai .. *Appellant**

v.

Ghulam Dastagir and others .. *Respondents.*

Madras City Tenants' Protection Act (III of 1922)—Applicability of the Act—Date of creation of tenancy—Physical continuity after the Act came into force of tenancy commened before the Act—Rent deed executed for the first time after Act came into force on the same rent and on almost the same terms as before—Tenancy originated when tenant entered into occupation.

The first defendant who had entered into occupation of certain premises prior to the passing of the Madras City Tenants' Protection Act, 1922, while continuing in such possession executed a rent deed in 1924, *i.e.*, after the Act had come into force, on the same rent and on practically the same terms as before. On a contention by the plaintiff landlord that a new tenancy was created after the commencement of the Act and that therefore the Act did not apply to the tenancy in question,

Held, that the tenancy originated at the time when the first defendant entered into occupation of the premises before the Act came into force and that in the circumstances, the execution of the rent deed in 1924 did not amount to the creation of a new tenancy.

Ranganatham Chettiar v. *Ethirajulu Naidu*, (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 (P.C.), distinguished.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 947 of 1941, dated 12th April, 1944.

W. S. Krishnaswami Naidu and *O. Radhakrishnan* for Appellant.

M. A. Hafiz, V. N. Srinivasa Rao and *C. R. Krishna Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the landlord of certain property in Madras who filed a suit to evict the tenant. The tenant claimed protection under the City Tenants' Protection Act on the ground that his tenancy originated before the Act came into force. The actual document of lease between the parties was executed in May 1924 which was after the Act came into force. It was held by the learned Additional City Civil Judge that in spite of the fact that there was no rent deed until 1924, the tenancy, nevertheless, originated at the time when the first defendant entered into occupation of the premises.

The only point that has been made in appeal by the landlord is that this case falls within the principle of the decision of the Privy Council reported in *Ranganadham Chettiar* v. *Ethirajulu Naidu*[1]. It was held in that case that in spite of the physical continuity of tenancy, the execution of a particular rent deed in 1923 marked the beginning of a new tenancy. There is, however, one significant fact in the Privy Council case which has no parallel in this case, and that is that the tenancy created by the lease of 1923 was at an increased rate of rent from that payable previously. In the present case the rate of rent has remained the same both before and after the execution of the lease deed in 1924. It seems to me that if there had been no difference in the terms of the two leases which were being considered by Their Lordships of the Privy Council, the decision would not have been that a new tenancy was created by the second lease but that the tenancy originated with the first lease. There is no oral evidence in this case as to the precise terms upon which the tenancy of the first defendant originated. We have the important fact that the rent was the same. The other terms of the tenancy except those which the Act invalidates are of minor importance, and I think I may fairly presume that those terms suffered no change or modification in 1924. It seems to me that if there is any question here of burden of proof it lies upon the plaintiff and not upon the first defendant. In the natural meaning of the word, the first defendant's tenancy obviously began before the Act came into force, and it is upon the plaintiff, in my opinion, that the burden lies to show that what occurred in 1924 was the creation of a new tenancy. He cannot merely show this by falling back upon a decision of principle upon distinguishable facts. On these grounds I am of opinion that the learned City Civil Judge was right in dismissing the plaintiff's suit.

In the result, the appeal fails and is dismissed with costs, one set.

V.S. ——— *Appeal dismissed.*

---

* C. C. C. A. No. 55 of 1944. 2nd March, 1945.

1. (1940) 1 M.L.J. 24 : L.R. 67 I.A. 25 : I.L.R. (1940) Mad. 172 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Thrikkaikkat Madathil Raman *alias* Arithottath Thirumumbu .. *Appellant**

v.

Vallikkat Ammalukutty Amma and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), *section* 20 (2)*—Suit for eviction—Facts to be proved—Building of temporary structure on the surface of the earth and planting of trees that do not take deep root—No proof that land was permanently impaired.*

In a suit for eviction under section 20 (2) of the Malabar Tenancy Act, the landholder would not merely have to prove that the land was materially impaired for agricultural purposes but that it was permanently impaired.

Where buildings of a temporary nature are constructed without any deep foundations but only from the surface of the earth and trees are planted which do not take deep root, it cannot be said that the land was permanently impaired.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 98 of 1943, preferred against the decree of the District Munsiff of Calicut in O. S. No. 39 of 1941.

K. P. Ramakrishna Aiyar for Appellant.

D. A. Krishna Wariar and *N. Gopala Menon,* for Respondents.

The Court delivered the following

JUDGMENT.—The respondent is a kanamdar and the appellant the owner of the suit land. The suit was filed for the eviction of the respondent on the ground that he had not paid the stipulated rent. The second defendant, who was the assignee of the kanam right, thereupon filed O. P. No 48 of 1941 for the renewal of the kanam, as he was entitled to do under the Act. The appellant then amended his plaint and furnished an additional ground for eviction, *viz.*, the commission of waste. That is the only question that was discussed in the lower appellate Court; and it is the only question to be considered in this Court. The lower appellate Court held that the appellant was not entitled to evict the respondent.

It is not sufficient for the appellant to prove waste. A mere diversion of the use of the land might amount to waste; but according to section 20 (2) he cannot have a tenant evicted unless he proves that the tenant:

> " has intentionally and wilfully committed such acts of waste as are calculated to impair materially and permanently the value or utility of the holding for agricultural purposes."

It is alleged that on two items of property, items 2 and 4, the defendant had filled up the paddy flats with earth, thereby converting them into parambas: and on one of the parambas so made he had constructed buildings and on the other a dwelling house and tea shop. He had also planted cocoanut trees and arecanut trees in parts of item 4. The trial Court held that these were not acts of waste, but were improvements. The lower appellate Court found it unnecessary to go so far; but it agreed with the District Munsiff that the land had not been " materially and permanently impaired " by the acts of the defendant. It therefore dismissed the appeal.

The learned District Munsiff considered the allegation that the paddy flats had been built up with earth and converted into parambas and found, disagreeing with the commissioner appointed to examine the land, that there was no evidence that the defendant had done so. In the lower appellate Court, the question of the liability of the defendants to be evicted from the land was considered purely as a question of law; and we find no discussion in the judgment of the lower appellate Court of the question of fact whether earth had been laid on the paddy fields to convert them into parambas. We must therefore assume that no such argument was put forward in the lower appellate Court and that the appeal was argued on the assumption that no such act was done. If, in fact, earth had been laid on the

* S. A. No. 845 of 1944. 20th March, 1945.

plots, it might be argued that section 20 (2) entitled the plaintiff to evict the defendant. This question does not however arise for consideration in second appeal.

The questions that have therefore to be considered in this Court are whether (1) the construction of the buildings and (2) the planting of cocoanut and arecanut trees, amount to acts of waste that "are calculated to impair materially and permanently the value or utility of the holding for agricultural purposes." I agree with the learned counsel for the appellant if it had been alleged and proved that deep foundations had been dug in his paddy fields for the construction of the house, he would have a strong case for eviction, but that appears not to have been done. The buildings are of a temporary nature and seem to have been constructed only from the surface of the earth. The trees are not trees that take deep root; and as the learned Subordinate Judge has pointed out, the prayer of the appellant that the cocoanut trees and arecanut trees should be uprooted and the land restored to its original condition, is itself an admission that the land had not been permanently impaired by the planting of these trees.

The learned counsel for the appellant has sought support for what would seem to be a very weak case in *Narayana Rao* v. *Zamindar of Muktyala Estate*[1], a decision with regard to section 151 of the Madras Estates Land Act. The wording of that section as it was before its amendment in 1944 was :

> "A landholder may institute a suit before the Collector to eject a ryot from his holding only on the ground that the ryot has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes."

Srinivasa Ayyangar, J., in delivering the judgment of the Court said :

> "The question with reference to him (the fifth defendant) is whether what he has done in respect of the land amounts or not, to use a general expression, to a diversion of the land from agricultural purposes. We use that expression deliberately, because taking the whole of section 151, the principle that seems to underlie that section is that when a holding is in the possession of a tenant he holds it on the terms agreed to or settled between the parties only for agricultural purposes and that as such tenant he is not at liberty to divert the land from the main purpose of the holding, namely, the agricultural purpose and any such diversion, it is provided, will entail a forfeiture whereupon the landholder might sue the tenant for ejectment."

This argument ignores the use of the words "has materially impaired the value of the holding for agricultural purposes," which would seem to be a question of fact in each case. Even assuming, however, that this judgment correctly construes section 151 of the Madras Estates Land Act, section 20 (2) of the Malabar Tenancy Act, is worded differently. In a suit for eviction under this Act, the landholder would not merely have to prove that the land was materially impaired for agricultural purposes but that it was permanently impaired. That he certainly has not done in this case. Because a house has been built on the surface of the earth, there is no reason to suppose that the land will be any the worse after the house has been demolished and the land ploughed.

Finally, it has been argued that even though the lower Court felt precluded by the wording of section 20 (2) from decreeing the eviction of the defendants, it should have granted an injunction requiring the defendant to restore the land to the purposes for which it was granted. It may well be that the plaintiff has a right to require the defendants to use the land for the purpose for which it was granted ; but the plaintiff has not asked for such a relief. It is true that he has asked the Court to require the defendants to restore the land before handing it back to him ; but that request was coupled with the prayer for eviction. The defendants were to be evicted and they were then to restore the land to its original condition before handing it back to the plaintiff.

There was no prayer that even though the defendants were not evicted, they should nevertheless be required to restore the lands to their original condition. The suit was only for eviction and for consequential reliefs.

The appeal fails and is dismissed with costs.

V.S. ——— *Appeal dismissed.*

---

1. (1928) 54 M.L.J. 621 : I.L.R. 51 Mad. 478.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Yeleswarapu Lakshmi Suryanarayana .. *Petitioner**

v.

Kudaravalli Venkataratnam .. *Respondent.*

Food Grains Control Order, (1942), *Clause* 3 (1)—*Advance of money to be discharged by delivery of grain —Transaction is a sale—Licence, when to be obtained—Suit on such contract for recovery of the value of the grain on failure to deliver—Relief that could be given.*

When a person advances money to another and the latter undertakes to pay grain for it at some future date, that transaction is a sale, even though the person who provides the grain has the use of the money for some time before he has to fulfil the contract.

The wording of clause 3 (1) of the Food Grains Control Order suggests that the licence mentioned therein has to be obtained before such a contract can be legally entered into.

In a suit on such a contract for the recovery of the value of the grain not delivered it was contended that the contract was unenforceable in view of the provisions of clause 3 (1) of the Food Grains Control Order.

Held, that the suit could, however, be treated as one for the return of the money advanced and decreed on that footing.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Masulipatam, dated 18th February, 1944, and passed in S. C. S. No. 54 of 1943.

C. Rama Rao for Petitioner.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT.—The suit in the lower Court was for a sum of money due on three contracts. Under these contracts, sums of money were advanced by the plaintiff to the defendant ; and the defendant undertook to deliver in discharge of the loan and the interest certain quantities of paddy. This paddy was not given in accordance with the contract ; and so the plaintiff now sues for the value of the paddy. We are now concerned only with one contract, Ex. P-1, dated the 12th July, 1942 ; and the chief question that the lower Court had to consider was whether that contract was enforceable in view of the provisions of clause 3 of the Food Grains Control Order. The lower Court held that it did not contravene those provisions.

Clause 3 (1) of the Food Grains Control Order says :

"No person shall engage in any undertaking which involves the purchase, sale, or storage for sale, in wholesale quantities of any food grain except under and in accordance with a licence . . ."

Sub-clause (*d*) of clause 2 says :

"'sale in wholesale quantities' means sale in quantities exceeding 20 maunds in any one transaction."

The learned Subordinate Judge's argument was that the sum of money advanced was a loan and that the paddy was to be given in discharge of the loan. It was not therefore, he argued, a transaction of sale. It is easy to see how the Food Grains Control Order could be circumvented by framing a sale so as to make it appear that the money paid was an advance and that the grain was merely a repayment of the loan ; but even if the transaction was what it purports to be, then it still seems to me that when a person advances money and another person undertakes to pay grain for it at some future date, that transaction is a sale, even though the person who provides the grain has the use of the money for some time before he has to fulfil the contract.

Another argument is that the transaction cannot be said to be in contravention of the order ; because the parties may have intended to procure a licence from the Provincial Government. There is however no evidence that they intended to do so ; and the wording of clause 3 (1) suggests that the licence has to be obtained before a contract can legally be entered into, because the contract has to be under and in accordance with the licence. A contract can hardly be said to be under and in accordance with a licence that has not been issued.

* C. R. P. No. 993 of 1944. 16th March, 1945.

It was finally argued that the quantity of grain involved was less than 20 maunds. If that were so, then the plaintiff had an obvious and complete answer to the defendant's plea. The fact that he did not put it forward in the lower Court is very good evidence that this contention raised in this Court for the first time is without substance.

The suit can however be treated as one for the return of the money advanced. No interest could then, however, be granted, except from the date of the suit.

The petition is therefore allowed and the decree of the lower Court modified, as far as this particular transaction is concerned, by making it one for Rs. 200 with interest at six per cent. from the date of the suit. The lower Court's decree with regard to the other two transactions is affirmed, as the petition has not been pressed with regard to them.

Both parties will bear their own costs in both the Courts.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

S. A. S. Rathnathammal .. *Appellant**

v.

M. Arulanandam Pillai and others .. *Respondents.*

Will—Will by a Christian—Clause "I earned all the properties and after my lifetime my wife and foster-daughter should get those properties"—Schedule to will describing the properties—Construction—Properties at time of death and not as on date of execution of will disposed of—Bequest is to wife and foster daughter jointly.

A clause in a will by a Christian was as follows :" Without inheriting any ancestral property, I earned all the properties belonging to me as my self-acquisitions. After my lifetime my wife and my foster-daughter *R* should get those properties and enjoy them " and there was a schedule attached to the will describing the properties in the possession of the testator at the time when he drew up the will. On a construction of the will,

Held, that (1) the appending of the schedule of property at the end of the will was no indication that the testator intended to dispose of that property only.

(2) Merely because the testator said in the will that his property is self-acquired, it cannot be construed that he intended to limit the operation of his will to the property acquired up to that date. If he intended to bequeath only the property that he had acquired up to that time, he would have made that clear. Accordingly the property acquired by the testator after the execution of the will, will pass to the legatees as the will takes effect from the date of the testator's death.

(3) There was a bequest to the widow and foster-daughter jointly.

Appeal against the decree of the Court of the Subordinate Judge, Madura, in A. S. No. 63 of 1943 (A. S. No. 166 of 1943, District Court, Madura) preferred against the decree of the Court of the District Munsiff, Madura Town in O. S. No. 384 of 1941.

B. Sitarama Rao and *T. Krishna Rao* for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondents.

The Court delivered the following

JUDGMENT.—The matters argued in this appeal relate to the construction of a will executed by one vakil, B.S. Susai Pillai in favour of his widow and foster-daughter, the latter being the plaintiff. One question is whether on the construction of the will, the testator meant to leave the whole of his property, after the payment of certain legacies, to these two persons or whether he left them merely the property of which he was possessed at the time of writing the will. The other question is whether a bequest simpliciter to these two persons would be a bequest to them jointly or severally. The plaintiff's contention was that Susai Pillai bequeathed under this will the whole of his property and that it was a joint bequest. Both these points were decided against the plaintiff in the lower appellate Court.

The only passages with which we are concerned are found in paragraph 1 of the will, Ex. P-1, It runs :

" Without inheriting any ancestral property, I earned all the properties belonging to me as my self-acquisitions. After my lifetime, my wife Thavamani Ammal and my foster-daughter Annal Suvakee Ratnam (plaintiff) should get those properties and enjoy them."

* S. A. No. 1003 of 1944. 21st March, 1945.

The word "those" in the second sentence means that the testator is referring to the property mentioned in the first sentence.

There was a schedule at the end of the will describing the property in the possession of the testator at the time when he drew up the will; but I cannot attach much significance to it. Such schedules are not uncommonly attached to wills for purpose of facilitating the administration of the estate by the executor. My attention has not been drawn to any cases in which it has been said that the appending of a schedule at the end of a will is an indication that the testator intended to dispose of that property only. So the matter must depend upon whether the first sentence "without inheriting any ancestral property, I earned all the properties belonging to me as my self-acquisition" means that the subject of the will is merely the property that he had upto that time acquired. The object of that sentence seems to be to indicate that his property was not family property in which any other member of his family had any claim. One might have thought that such an assertion was unnecessary in a bequest by a Christian; but one has to remember that the ideas of Christians with regard to their property do not differ materially from those of their Hindu neighbours. I do not think that this sentence means anything more than that the property of which he was disposing was his own absolute property. It is undoubtedly a general rule of construction of wills that one should not so construe a will, unless the wording makes it necessary to do so, as to lead to an intestacy with regard to some part of the testator's property. If the plain wording of the will makes that interpretation inevitable, that is another matter; but I do not think that because a testator said that his property is self-acquired, that he thereby intended to limit the operation of his will to the property acquired upto that date. He must have known, especially as he was a vakil, that his will would speak from the date of his death; and so if he had intended to bequeath only the property that he had acquired upto that time, he would undoubtedly have made that clear.

In In re *Lloyd* v. *Hatchet*[1], where there was a devise of "all my copyholds now held by me as a customary tenant of the said manor, or otherwise," this clause was held not to mean that the testator was disposing only of the copyholds that he had at the time of drawing up his will. It was pointed out that one should interpret the will so as to make it appear that the testator disposed of all the property in his hands, at the time of his death, unless the words used make it clear that he had not intended to do so; and it was held that even the use of the words "now held by me" was not sufficient to exclude an intention by the testator to dispose of the property in his possession at the time of his death. In *Alavandar Gramani* v. *Danakoti Ammal*[2], a Bench of this Court considered a question somewhat similar to that which arises in this appeal and the learned Judge delivering the judgment of the Court said:

> "The suit will contains no expression equivalent to the word "now," and although it is true that there are no express words indicating that the testator intended to provide for subsequent acquisitions, it is equally true that the will contains nothing to show that he wished to exclude them from its operation. The presumption against an intestacy in respect of those properties must, therefore, I think, prevail."

The learned advocate for the respondent has referred to three cases which he contends show that in the circumstances somewhat similar to these, Courts have held that the property bequeathed was that held by the testator at the time of the making of the will. In the first of these cases, *Baikanthanath* v. *Kashinath*[3] the will is not set out in the judgment; but one concludes from what is said about the will that it was a very much more complicated document than that with which we are dealing here; and the learned Judges thought, from a reading of the will, that the terms of the will made it clear that the testator was disposing only of certain property then held by him. That decision affords little assistance in construing the terms of Ex. P-1. In the second case, *Mafatlal* v. *Kannialal*[4], the property

---

1. (1920) 2 Ch, 1.
2. (1926) 99 I.C. 775.
3. (1912) 16 I.C. 553.
4. (1915) 17 Bom.L.R. 705.

bequeathed was first described in the will, and the testator then said that he bequeathed "the above mentioned moveable and immoveable property." That being so, there could of course be no doubt that the testator was disposing of the property just immediately described. The case in which the facts approach to those of this case most closely is *Piramu Ammal* v. *Serunatha Ammal*[1] an appeal decided by Devadoss, J. That case can however be distinguished from the present case in one important particular; and that is that the testator there said that he was bequeathing property worth Rs. 4,000. In the schedule attached to the will, the property was valued and the total amounted to Rs. 4,000. That strongly indicated that the testator meant to dispose of the property set out in the schedule and nothing more. In the case now under consideration, we find no limiting expressions which suggest that the testator meant to dispose of something less than what he had at the time of his death. The appeal must therefore be allowed with regard to items 8 (*a*) and 8 (*b*), the property acquired by the testator after the execution of the will.

Because the lower appellate Court held that a bequest simpliciter to two persons was a bequest in severalty, he gave the plaintiff only a half share in the properties which it held to have been bequeathed, whereas the plaintiff claimed that she was entitled to the whole of the property by survivorship after her foster-mother's death.

Prior to the Privy Council decision in *Jogeshwar Narain Deo* v. *Ramchandra Dutt*[2] Courts in India were inclined to apply to all Indian wills the principle of English law that a bequest to two persons simpliciter was a bequest to them jointly; but in this decision, their Lordships said :

> "The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenary between the members of an undivided family."

Despite this case, some Courts in India continued to apply the English principle even to Hindu wills, until in *Mussammat Bahu Rani* v. *Thakur Rajendra Baksh Singh*[3], their Lordships of the Privy Council put the matter beyond doubt. They quoted a passage from *Jogeshwar Narain Deo* v. *Ram Chandra Dutt*[2] and then said :

> "In their Lordships' opinion this is a clear ruling that the principle of joint tenancy is unknown to Hindu Law except in the case of the joint property of an undivided Hindu family, governed by the Mitakshara law which under that law passes by survivorship."

It is argued by the learned advocate for the respondents that if that is so with regard to Hindus, who are acquainted with the principle of jointness, then *a fortiori* the principle would apply to Christians. The position however seems to be that since there is no special law in India for Christians, English law has generally been applied to them; and the Indian Succession Act, which governs their wills, follows very closely the principles of English law. One would therefore expect that as far as a bequest by a Christian is concerned, English law would be applied. In *Arakal Joseph Gabriel* v. *Domingo Inas*[4], the construction of a gift deed by a Christian came up for consideration. There, the donor made a gift of property to his three children. Two of them died. The question arose whether the survivor was to take the whole of the property or only a third. If the gift was a joint one, then the surviving third child would take the whole of the property. If, on the other hand, it was a gift in severalty, then the surviving child would take only one-third. The learned Judges thought that the illustration to section 106 indicated that the Legislature intended to apply the English principle that if there was a gift or bequest simply to two persons, then it was a gift or bequest to them jointly. The illustration is :

> "The legacy is simply to *A* and *B*. *A* dies before the testator. *B* takes the legacy."

B would of course only take the legacy if it was to *A* and *B* jointly. The word "jointly" was however not used, the legacy being simply to *A* and *B*. The learned Judges said :

---

1. (1924) 86 I.C. 737.
2. (1896) 6 M.L.J. 75 : L.R. 23 I.A. 37 : I.L.R. 23 Cal. 670 (P.C.).
3. (1933) 64 M.L.J. 555 : L.R. 60 I.A. 95 : I.L.R. 8 Luck. 121 (P.C.).
4. (1910) 20 M.L.J. 377 : I.L.R. 34 Mad. 80.

"The rule of English law is to presume that the donees are joint tenants. This principle is adopted by the Indian legislature in the illustration to section 93 (now section 106) of the Succession Act. The illustration no doubt deals with the case of a legacy. But the same principle is applicable to wills as to gifts unless there are special rules justifying a deviation. We must therefore regard the gift in this case as joint."

Later, they dealt with an objection that English law should not be applied in this country and said :

"But we see no objection to the application of the English rule in a matter in which the Indian legislature has shown its leaning in its favour."

This case has never been dissented from by this Court or by any other Court. Mr. Sitarama Rao for the appellant relies on *Navroji Manockji Wadia* v. *Perozbai*[1] as a decision more directly to the point. There, the learned Judges were construing a will by a Parsi ; but it would appear from the argument that they did not interpret correctly the Privy Council decision in *Jogeswar Narain Deo* v. *Ramchandra Dutt*[2], which was clarified and explained in the later Privy Council decision in *Mst. Bahu Rani* v. *Thakur Rajendra Baksh Singh*[3]. Adopting the principle laid down in *Arakal Joseph Gabriel* v. *Domingo Inas*[4], I must hold that there was a bequest to the plaintiff and her foster-mother jointly and that the plaintiff is therefore entitled to succeed to the property bequeathed under the will, in so far as she has asked for it in her plaint.

The result is that there will be a decree for the plaintiff with regard to items 1 to 5, 8 (*a*) and 8 (*b*). The respondent will pay the costs of the appellant in this Court. There will be no modification of the order of the lower appellate Court as to costs.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Nacharammal and others .. *Appellants**

v.

Veerappa Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), section 48—"The decree that is sought to be executed"—Appellate Court confirming decree of original Court—Date of appellate decree as starting point—Conditional decree—Application filed without fulfilling condition—Effect—Limitation Act (IX of 1908), Article 182—Appellate order in execution—Starting point of limitation.

The words "the decree that is sought to be executed" in section 48, Civil Procedure Code is the decree of the appellate Court even though it confirms the decree of the original Court, and the period of twelve years should be computed from the date of the appellate decree.

Even though the amount which has to be deposited before delivery of possession could be given is not deposited along with the application for delivery it will still be a proper application if it otherwise fulfils the requirements of the Code of Civil Procedure and will save limitation.

Where an execution application forms the subject of appeal the three years period prescribed by Article 182 of the Limitation Act should be computed from the date of the final order of the "final Court of Appeal."

Appeal against the order of the District Court, Madura, dated 9th November, 1943 and made in A. S. No. 55 of 1943 (E. P. No. 105 of 1942 in O. S. No. 27 of 1920, Subordinate Judge's Court, Dindigul.)

T. Krishna Rao for Appellants.

T.V. Muthukrishna Aiyar and *K. Parasurama Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of proceedings in execution and the question for consideration is as to whether the execution petition out of which the appeal

1. (1897) I.L.R. 23 Bom. 80.
2. (1896) 6 M.L.J. 75 : L.R. 23 I.A. 37 : I.L.R. 23 Cal. 670 (P.C.).
3. (1933) 64 M.L.J. 555 : L.R. 60 I.A. 95 : I.L.R. 8 Luck. 121 (P.C.).
4. (1910) 20 M.L.J. 377 : I.L.R. 34 Mad. 80.

* A. A. A. O. No. 66 of 1944. 7th March, 1945.

arises is barred by limitation. The decree in the suit was passed on the 1st December, 1922. It directed delivery of certain properties on payment of a certain amount. The original decree directed that Rs. 17,644-12-0 should be deposited. There was an appeal and the appellate Court on 28th September, 1926, modified the decree of the first Court and reduced the amount to be deposited to Rs. 6,113-8-0. It was taken to this Court in second appeal which was dismissed on the 21st November, 1930. The first execution petition, E. P. No. 169 of 1933, was filed on the 21st November, 1933. After enquiry as regards the amount that had to be deposited an order was passed on the 23rd March, 1934, directing the decree-holder to deposit into Court Rs. 6,960-0-2 by a particular date fixed by the Court. As the amount was not deposited, the petition was dismissed on the 9th April, 1934. The matter was taken to the Madura District Court in appeal which appeal was dismissed on the 7th March, 1936. A civil miscellaneous second appeal was filed in this Court, No. 127 of 1936, which was dismissed on the 17th August, 1939. This petition, E. P. No. 105 of 1942, out of which this appeal arises, was filed on the 13th August, 1942.

Three objections on the ground of limitation were raised, one of which was that the application E. P. No. 169 of 1933, filed on the 21st November, 1933, was not a proper application in accordance with law, as the amount directed to be paid before the decree-holder could obtain delivery of possession was not deposited with the application. The second objection raised was that the present application, E. P. No. 105 of 1942, was filed more than three years after the date of the final order on E. P. No. 169 of 1933. It was contended, however, that the final order would be the order in C. M. S. A. No. 127 of 1936 which was passed by this Court on the 17th August, 1939. The third objection raised was that as this application was filed on the 13th August, 1942, more than twelve years after the date of the lower appellate decree it was barred by limitation under section 48 of the Code of Civil Procedure. With regard to the first objection it has been held by a Bench of this Court that even though the amount which has to be deposited before delivery could be given was not deposited with the application, it would still be a proper application if it otherwise fulfils the requirements of the Code of Civil Procedure—Vide *Alagiriswami Naidu* v. *Venkatachalapathi Iyer*[1].

With regard to the second point, there is a decision of a Bench of this Court in *Abdul Razak* v. *Abubakkar Ambalam*[2] which has held that the starting point of limitation is the date of the final order of the "final Court of Appeal."

The appeal was argued mainly on the objection based under section 48 of the Code of Civil Procedure. That section runs thus:

> "Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from (*a*) the date of the decree sought to be executed * * * * *"

In the corresponding section in the old Code of 1882 there were the words "or of the decree in appeal if any affirming the same" indicating thereby that if there is any appeal against any decree and the appeal was dismissed by affirming the decree appealed against, the twelve years started from the date of the appellate decree. Because there was this specific provision in the Code of 1882 about the starting point of limitation in cases where a decree has been affirmed on appeal and that provision is not found in the Code of 1908, it is urged that in such cases the starting point is not the date of the order in the appeal affirming the original decree but the date of the original decree itself. The question came up for decision before this Court on two occasions. In *Narasayya Hegde* v. *Vitlaprabhu*[3], Phillips, J., held that the starting point was the date of the order in appeal. I had occasion to consider it in *Bathumkava Ammad* v. *Veliya Palara Kunhamed Kuti*[4]. Following the observations

1. (1907) 17 M.L.J. 566 : I.L.R. 31 Mad. 77.
2. L.P.A. No. 67 of 1939.
3. (1911) 21 M.L.J. 1020.
4. C.M.S.A. No. 159 of 1943.

of a Bench of this Court in *Nagalinga Chetti* v. *Srinivasa Iyengar*[1], I held that the starting point of limitation would be the date of the decree of the first Court. My attention was not then drawn to the observations of the Privy Council and of other benches of this Court as regards what was ' the decree sought to be executed ' in such cases. Under section 48 of the Code of Civil Procedure the period of twelve years commences from " the date of the decree sought to be executed." It does not state whether the decree sought to be executed in such cases is the original decree or the appellate decree. It is urged for the respondent that the decree sought to be executed in such cases is the decree of the appellate Court confirming the original decree and not the decree of the lower Court, and as this petition has been filed within twelve years from the date of the former decree it is in time. In *Nagalinga Chetti* v. *Srinivasa Iyengar*[1], the decree sought to be executed was one passed in a small cause suit. There was a new trial application and when it failed, a revision petition was filed in this Court, and it was contended that the starting point of limitation under section 48 was the date of the dismissal of the civil revision petition. On the observations of the Privy Council in *Nagendranath De* v. *Sureschandra De*[2], that as there was no definition of appeal in the Code of Civil Procedure any application by a party to an appellate Court asking it to set aside or revise a decision of a subordinate Court would be an appeal within the meaning of that word, it was contended that the starting point of limitation under section 48 of the Code of Civil Procedure would be the date of the disposal of the revision petition. But that was not accepted, Burn, J., observing,

> " There is no analogy between Article 182 of the Limitation Act and sectoin 48 of the Code of Civil Procedure, because Article 182 expressly states that all applications that fall under section 48 of the Code of Civil Procedure are excluded from its operation."

when reliance was sought to be placed on the analogy of Article 182 under which the starting point of limitation is the date of the appellate order. It does not appear from the judgment of the Bench in that case that there was any argument advanced as to what was meant by the words " the decree sought to be executed," found in section 48 of the Code of Civil Procedure. In a later case, *Veerappa Chettiar* v. *Sivagami Achi*[3], another Bench of this Court had to consider the question as to whether an application under section 19 of the Madras Agriculturists' Relief Act should be made to the first Court or to the appellate Court when there was a decree by the first Court which was affirmed on appeal by the appellate Court. It was argued that though such a petition would have to be filed in the appellate Court where the decree passed in the first instance was modified or reversed by the appellate Court, in cases where the appellate decree merely confirmed the original decree, the decree of the original Court was the only decree to be executed and it was the decree of the original Court that would be left standing and the only decree to be executed. Venkataramana Rao, J., in his judgment pointed out that this Court has throughout followed the view taken by Sir John Edge in *Mohamed Sulaiman Khan* v. *Mohamed Yarkhan*[4] that the effect of section 579 of the Code of 1882 (corresponding to Order 41, rule 35 of the Civil Procedure Code, 1908) was to cause the decree of the appellate Court to supersede the decree of the Court below even when the decree of the appellate Court was one which merely affirmed that decree below and did not even reverse or modify it and that the only decree that could be amended was the decree to be executed and the decree to be executed was the decree of the appellate Court and not the decree of the Court below. He referred to two Bench decisions of this Court in *Manavikraman* v. *Unniappan*[5] and *Pichuvayyangar* v. *Seshayyangar*[6]. It was also pointed out by him that that view was later approved by the Privy Council in *Brij Narain* v. *Tejbal Bikaram Bahadur*[7] and that Bhashyam Ayyangar, J., in *Krishnamachariar* v. *Mangammal*[8] had observed that when an appeal is preferred from a decree of a Court of first

1. (1941) 1 M.L.J. 365.
2. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 (P.C.).
3. (1941) 2 M.L.J. 1064.
4. (1888) I.L.R. 11 All. 267 (F.B.).
5. (1891) 2 M.L.J. 23 : I.L.R. 15 Mad. 170.
6. (1894) 5 M.L.J. 39 : I.L.R. 18 Mad. 214 (F.B.).
7. (1910) 20 M.L.J. 587 : L.R. 37 I.A. 70 : I.L.R. 32 All. 295 (P.C.).
8. (1902) I.L.R. 26 Mad. 91.

instance, the suit is continued in the Court of appeal and reheard either in whole or in part, according as the whole suit is litigated again in the Court of appeal or only a part of it and that the final decree in the appeal will thus be the final decree in the suit, whether that be one confirming, varying or reversing the decree of the Court of first instance. And finally Venkataramana Rao, J., observes :

"The contention that the decree of the original Court when it is confirmed in appeal is still the decree to be executed is thus opposed to principle."

Since both the Privy Council as well as the several Benches of this Court have understood the words "the decree that is sought to be executed" in cases where there is an appeal which confirmed the original decree as referring to the decree of the appellate Court, I have to revise my opinion and hold that the decree sought to be executed in this case is the decree of the appellate Court even though it confirmed the original decree of the first Court, and as this petition is within twelve years from the date of the appellate decree, it is not barred by limitation.

In the result the appeal fails and is dismissed with costs.

Leave granted.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AYYAR.

Kolimi Mahabub Sahib and others .. *Appellants**

v.

Sri Sidheswaraswami temple at Devalampeta and others .. *Respondents.*

Public way—Newly erected mosque on it—Agreement at time of erecting mosque by all the then Muhammadan residents of the village not to object to processions by Hindus with music opposite the mosque—Muhammadan community how far bound—Penal Code (XLV of 1860), *section* 296—*Gist of offence under.*

A new mosque had come into existence somewhere about 1904 or 1905, and permission was given to the Muhammadans of the village, who wanted to have that mosque erected, to construct it on a particular site, despite objections raised by the Hindus, and on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the High Road in connection with private or temple processions. In a suit by the Hindu residents of the village for declaration of their right to pass along the particular public road in procession to the accompaniment of music, it was contended that the undertaking was not binding against the Muhammadan community and that it was not open to a few Muhammadans however influential, or even to all the Muhammadan residents of a particular place or locality to enter into an agreement of that kind.

Held, that the agreement was binding on the Muhammadan community.

Mere playing of music before a mosque cannot amount to an offence under section 296 of the Penal Code though a deliberate intention to disturb may not be necessary. Before that section could apply it must be found as a fact that there was a substantial andnot merely fanciful disturbance of the worship. Accordingly the Hindus' right cannot be declared subject to a condition requiring them to stop playing in the processions musical accompaniments within the limits of one chain on either side of the mosque compound at the five times of the public congregational prayers in the mosque.

Rangiah Chetti v. *Khaja Syed Hassumiah*, (1938) 2 M.L.J. 165, distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Chittoor, in A. S. No. 22 of 1942 (A. S. No. 62 of 1942, District Court, Chittoor) preferred against the decree of the Court of the District Munsiff, Madanapallee, in O. S. No. 291 of 1940.

B. Pocker and *A. M. Alla Pichai* for Appellants.

A. Bhujanga Rao and *R. Krishna Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—Defendants 26 onwards, who are the Muhammadan residents of a village called Kalakada in the Chittoor district, are the appellants in this second appeal. The suit is a representative one by the Hindu residents of the village for a declaration of their right to pass along the bit of the Chittoor-Cuddappah trunk road in Kalakada village in procession to the accompaniment of music notwithstanding the existence of a mosque on that road. The District Munsiff gave the plaintiffs a decree declaring their right, subject however to three conditions : (1) that

* S. A. No. 394 of 1943. 10th July, 1945.

the processions do not obstruct the lawful user of the highway by other members of the public; (2) that the processions are subject to all lawful orders passed by the Magistrate and the Police; and (3) that musical accompaniments of the processions should stop playing, within the limits of one chain on either side of the compound walls of the suit mosque at the five times of public congregational prayers in the mosque. He also declared the right of the Hindus to play music in their private residences subject to the law relating to nuisance against which a member of the public can get relief in Courts. On appeal, the Subordinate Judge deleted the third condition above mentioned. This second appeal is directed against this declaration.

In support of his argument, Mr. Pocker has placed very strong reliance on the decision in *Rangiah Chetty* v. *Khaji Syed Hassumiah*[1], as supporting the propriety of such a condition as that imposed by the District Munsiff. But for one distinguishing feature, which I believe to be a conclusive circumstance against the appellants, I would have reimposed the condition, following the decision cited. The feature is this. This particular mosque is not the ancient mosque in the village. It is a new mosque that came into existence somewhere about 1904 or 1905, and permission was given to the Muhammadans of the village, who wanted to have this mosque erected, to construct it on a particular site, despite objections raised by the Hindus and on the undertaking given by all the then Muhammadan residents of the place that there shall be no obstruction raised by them to music being played on the High Road in connection with private or temple processions. The actual words used in Ex. P-4 are these :

> "Because of the Masjid we shall raise no obstruction to melam or music of any kind in Hindu houses or in connection with temple processions going and coming along the High Road. There will be no objection from us or from our co-religionists to members of other religions and faiths going along the way accompanied by music at any time."

It is rightly pointed out by the Subordinate Judge that the mosque or masjid was allowed to be built on this undertaking and that the rights of the public which were intended to be preserved by Ex. P-4 must be upheld even now. Troubles started only in 1939 when objection seems to have been raised for the first time by the Muslims to Hindu processions with music.

Mr. Pocker urged that Ex. P-4 is not binding against the Muhammadan community, especially when the grantees are not the residents of the place but Muhammadans in general wherever they may reside. He argued that it was not open to a few Muhammadans, however influential, or even to all the Muhammadan residents of a particular place or locality to enter into an arrangement of this kind, which would mean the offering of a premium to members of other religions to disturb Muslim congregational worship in mosques. He also pointed out that such a disturbance is an offence under section 296 of the Indian Penal Code. In connection with this argument he referred to the agreement, Ex. D-1, dated 22nd January, 1939, by the Hindus of the village in favour of the Muhammadans, under which it was arranged that music should stop near the mosque at specified places.

To accept the first portion of this argument would be to hold that, in a case where a mosque is concerned, there can never be any such agreement given by any Muslim or Muslims at any time capable of enforcement, as it would always be open to persons who were not actually parties to the agreement to come up and say that they are not bound, even though it may be that all the inhabitants of the locality of the same faith agreed to a particular course. Such an extreme contention is obviously untenable. I am not prepared to assent to the broad proposition that the playing of music near a mosque would by itself, without anything further, amount to an offence within the meaning of section 296 of the Indian Penal Code. Any deliberate intention to disturb the worship may not be necessary, but surely it must be found as a fact before the section could apply, that there was a substantial and not merely fanciful disturbance of the worship. I do not think that the learned

1. (1938) 2 M.L.J. 165.

Judges who decided *Rangiah Chetty* v. *Khaji Syed Hassumiah*[1] intended to lay down any such broad proposition as contended for by Mr. Pocker.

The latter part of the argument based on Ex. D-1 would have had force, but for the circumstances under which it has been found it came into existence. The District Munsiff who deals with it in paragraph 21 states that he was not prepared to attach any significance or importance to it because it was influenced by election factions and it was a case of some of the Hindus, who identified themselves with Muslim parties in connection with the election to the Village Panchayat Court having executed an agreement at the request of the Muslims and to oblige them. But for this infirmity, I would have held this agreement binding on the Hindus of the locality.

There were good grounds for the Subordinate Judge removing the third condition. The mosque is a recent one comparatively speaking, and it has been found by both the Courts below that till 1939 or 1940 the mamool or the practice has been for processions being taken along the road with music, in accordance with the undertaking originally given when the mosque was allowed to be built. If, taking advantage of this right declared in their favour, any Hindu or group of Hindus disturb public congregational prayers going on in the mosque by the adoption of obnoxious methods such as employment of instruments devised for causing trouble and annoyance, or by playing incessant music in or around the mosque or by needless or new processions started for the purpose of spiting their Muslim brothers, they can always be brought to book by being prosecuted. If any breach of the peace is apprehended the Police and the Magistrate can always issue orders for its prevention and any declaration by the Court of the right of the Hindus will be subject to those orders, as provided for in the decrees of the lower Courts.

In the circumstances of this case the Muslim appellants cannot ask for more and the second appeal is dismissed with costs.

Leave to appeal is refused.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

A. R. Krishnaswami Iyer .. *Petitioner**

v.

M. N. Ramakrishna Iyer .. *Respondent.*

Limitation Act (IX of 1908), *section* 20—*Payment by cheque—Whether payment in writing within the meaning of the section.*

A payment by cheque made by the debtor in favour of the creditor is a payment which satisfies the condition of section 20 of the Limitation Act.

Where a debtor by agreement undertook to pay his creditor Rs. 30 each month by a particular date but he allowed his payment to fall into arrears for more than three years and the creditor filed an execution petition within three years from the last payment made by a cheque, on the question whether the payment by a cheque was a payment evidenced by writing,

Held, that it was.

Mackenzie v *Thiruvengadathan*, (1886) I.L.R. 9 Mad. 271 and *Ramchander* v. *Chandi Prasad*, (1897) I.L.R. 19 All. 307, distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, dated 10th January, 1944, and made in E. P. No. 3597 of 1943 in O. S. No. 444 of 1938, District Munsiff Court, Trichinopoly.

N. Panchapakesa Aiyar for Petitioner.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The respondent obtained a decree against the petitioner. By agreement, the petitioner was to pay to the respondent Rs. 30 on the 26th of each month. Two payments seem to have been made within time. The payment-

1. (1938) 2 M.L.J. 165.

* C.R.P. No. 668 of 1944. 16th March 1945.

due on 26th June, 1940, was paid on the following day and accepted by the decree-holder, who obviously waived the default. No other payment was made until 11th September, 1940, when a cheque for Rs. 30 was given to the respondent by the nephew of the petitioner, who has been found by the Court below to have been the agent of the petitioner for that purpose. That cheque was in due course cashed. The respondent does not specifically say that he appropriated that payment towards the July instalment; but pleads that payment as saving limitation by virtue of the provisions of section 20 of the Limitation Act. He has filed his execution petition within three years of that payment. If he had appropriated that payment to the July instalment, then the next instalment would not have been due until the 26th August, 1940, and his execution petition would have been in time; for the execution petition was filed on 26th August, 1943. That was not however the respondent's contention. The principal question considered by the Court below was whether the payment by cheque was a payment evidenced by writing. It held that it was.

Had it not been for an old decision of this Court in *Mackenzie* v. *Thiruvengadathan*[1] which was followed without discussion in *Ramchander* v. *Chandi Prasad*[2], I would have had no difficulty in holding that a payment by cheque was a conditional payment, subject only to realisation. Sir Lawrence Jenkins said in *Kedarnath Mitra* v. *Dinabandu Saha*[3]:

> "It seems to me clear that if a cheque be delivered to a payee by way of payment and is received as such by him, it operates as payment and is an extinguishment to that extent of the debt, though this is no doubt subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives."

In *Mackenzie* v. *Thiruvengadathan*[1] the learned Judges had to consider a payment by means of a cheque that had not been made by the debtor, but which had been endorsed over by him to his creditor. An endorsement would not amount to a payment acknowledged in the handwriting of the person making the payment; but the difficulty lies in the words used by the learned Judges in saying so. They said:

> "The cheque is only an order for payment and it does not evidence any payment at all."

Ramchander v. *Chandi Prasad*[2] was also a case of payment by an endorsed cheque. The learned Judges in the Calcutta case would probably not have followed *Mackenzie* v. *Thiruvengadathan*[1] even though payment had been made by an endorsed cheque; but they were content to distinguish it. Other High Courts have distinguished it or dissented from it. In other High Courts there is a unanimity of opinion that a payment by cheque made by the debtor in favour of the creditor is a payment which satisfies the condition of section 20 of the Limitation Act; and I am not prepared to say that *Mackenzie* v. *Thiruvengadathan*,[1] which did not have to consider such a case, laid down a different law.

If the cheque of 11th September, 1940, comes within the mischief of section 20 of the Limitation Act, there can be no doubt that the petition was in time. The petition is dismissed with costs.

K.C. *Petition dismissed.*

---

1. (1886) I.L.R. 9 Mad. 271.
2. (1897) I.L.R. 19 All. 307.
3. (1915) I.L.R. 42 Cal. 1043.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Natteti Poliah and others .. *Petitioners**

v.

Alapati Muniswami Chetty and another .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936), section 10 (3)—' Civil Court' before which creditor whose debt has been declared discharged under section 10 (1) may file application for revival of his debt—Should be one having pecuniary as well as territorial jurisdiction as regards the debt sought to be revived.

The Civil Court contemplated in section 10 (3) of the Madras Debt Conciliation Act before which a creditor may file an application for revival of his debt (which had been declared discharged under sub-section (1) of that section) is the Civil Court which would be competent to entertain a suit for the recovery of the debt sought to be revived. Consequently a District Munsiff would not be competent to entertain an application for revival of a debt amounting to more than Rs. 3,000 on the date of the application to the Debt Conciliation Board. The Court should be possessed not only of territorial but also of pecuniary jurisdiction.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Nellore dated 18th April, 1944, and made in O. P. No. 86 of 1941.

K. Umamaheswaram for Petitioners.

K. Krishnamurthi for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent in the lower Court, a creditor, filed an application under section 4 of the Madras Debt Conciliation Act to the Debt Conciliation Board, Gudur, for the settlement of the debts of respondents 2 to 5 in the Court below. The petitioner in the lower Court who is the first respondent herein is another creditor who claims under a mortgage deed in his favour dated 19th July, 1934, the principal sum of Rs. 2,739-9-7 and subsequent interest at 6 per cent. per annum. Under section 10 (1) of the Act notice of the application was issued in the manner prescribed and it was duly served on the first respondent herein on the 14th February, 1941. He, however, did not file a statement with regard to his debt within the time prescribed, that is, two months from the date of receipt of the notice. In due course the Debt Conciliation Board approved on 31st July, 1941, a composition scheme and discharged the debt of the first respondent. On the 29th of August, 1941, the first respondent herein filed the present application under section 10 (3) of the Madras Debt Conciliation Act in the Court of the District Munsiff of Nellore. He prayed that the Court may be pleased to set aside the order of the Debt Conciliation Board discharging his debt and to revive his debt. He alleged that the petition was within time as the orders of the Board were passed on 31st July, 1941, and he became aware of the said order four days before the date of the application. Several objections were raised on behalf of the debtors as well as by the petitioning creditor. The learned District Munsiff overruled all the objections and directed that the first respondent's debt be revived. Respondents 2 to 5 in the Court below have preferred this Civil Revision Petition against the order of the District Munsiff.

Though several objections as mentioned above were raised in the Court below the learned advocate for the petitioners confined himself to two of them. He first urged that the District Munsiff of Nellore had no jurisdiction to entertain the petition as the debt sought to be revived amounted to more than Rs. 3,000 which is the pecuniary limit of the learned District Munsiff's jurisdiction. He next urged that the petitioner in the lower Court did not establish by evidence that he was really unable to submit the statement for sufficient reason, the reason given being that he was laid up with typhoid fever.

Under sub-section (3) of section 10 of the Act, the creditor may file an application for revival either before the Debt Conciliation Board or a " Civil Court." There is no definition of " Court " or " Civil Court " in the Act ; but it is clear to me that the " Civil Court " contemplated is the " Civil Court " which would be

* C. R. P. No. 1224 of 1944. 27th July, 1945.

competent to entertain a suit for the recovery of the debt sought to be revived. A reference to the wording of sections 25 and 27 of the same Act fortifies me in this view. Section 25 speaks of a suit or other proceeding pending before a Civil Court in respect of any debt. Section 27 refers to a suit or proceeding before a Civil Court for the recovery of a debt which was the subject of any proceeding under the Act. So understood, the District Munsiff of Nellore would certainly be not competent to entertain a suit for the recovery of the debt in question which must have amounted to more than Rs. 3,000 on the date of the application to the Debt Conciliation Board. The learned advocate for the respondent contended that the only limitation that should be placed on the jurisdiction of a Civil Court referred to in the sub-section is the territorial limitation. I do not see any logic in such a restriction. A Civil Court should be possessed not only of territorial but also of pecuniary jurisdiction in regard to it before it can entertain any suit. The application was therefore not maintainable in the District Munsiff's Court and ought to have been dismissed.

I therefore set aside the order of the learned District Munsiff, Nellore, and dismiss O. P. No. 86 of 1941. Mr. Krishnamurthi for the respondent urged that the petition may be directed to be re-presented to the proper Court. I am not sure if the procedure indicated under Order 7, rule 10, would apply to this case. In any event, it cannot be said that the order of dismissal is wrong. If so advised, the respondent may try to pursue his remedy in a competent Court. The first respondent will pay the petitioners their costs here and in the lower Court.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Addepalli Satyanarayana .. *Appellant**

v.

Munnaluri Rama Rao and others .. *Respondents.*

Limitation—Delivery of symbolical possession—Interruption of possession—Person deriving title through judgment-debtor—Saving of limitation.

The principle laid down by the Privy Council in *Thakur Sri Radha Krishna* v. *Ram Bahadur*, (1917) 34 M.L.J. 97 (P.C.) that symbolical delivery of possession momentarily interrupts the possession of the judgment-debtor and thereby extends the period of limitation is equally applicable to persons who derive their title through the judgment debtor.

Appeal against the decree of the District Court, Kistna, at Chilakapudi, dated 10th February, 1944, and passed in A. S. No. 252 of 1943, preferred against the decree of the Court of the District Munsiff, Gudiwada, in O. S. No. 176 of 1942.

M. S. Ramachandra Rao for Appellant.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The appellant is a purchaser *pendente lite* of the mortgagor's right in the hypotheca. The mortgagee obtained a decree, and apparently without knowledge of the transfer to the appellant, the second defendant executed, the decree against the judgment-debtor and obtained symbolical delivery of the property. He filed the present suit for possession just twelve years after he had obtained symbolical delivery. The question is whether the suit is in time, in view of the circumstances that the second defendant was in possession before the decree-holder obtained symbolical delivery. Both the Courts below held that the suit was in time.

It has been argued here as a question of fact that symbolical delivery was not regularly given, but it appears from the judgment of the lower appellate Court that the arguments there proceeded on the basis that it was. This second appeal must therefore be disposed of on that basis.

---

*S. A. No. 1366 of 1944. 19th March, 1945.

The symbolical delivery amounted to a momentary interruption of the enjoyment not only of the judgment-debtor, but of the second defendant, who claims through him. I should not have thought that this matter permitted of any doubt, but for the fact that a Bench of the Allahabad High Court in *Narain Das* v. *Lalta Prasad*[1], thought that symbolical delivery would interrupt only the possession of the judgment-debtor and not of those claiming through him. The learned Judges said :

> "Had the judgment-debtor been in possession, the delivery of formal possession, whether under section 318 or 319 of the Code of Civil Procedure, would have amounted to an ouster of the judgment-debtor and an entry into possession by the purchaser. If subsequently to this delivery of possession the judgment-debtor remained in possession, his possession would amount to an ouster of the purchaser and would be adverse possession from the date of the ouster ; but in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession."

Although this statement, as far as it goes, seems unexceptionable, it is difficult to see how the possession of a person who claims through the judgment-debtor is in any way superior to the possession that the judgment-debtor would have had. If the third party is a stranger, then the correctness of what the learned Judges have said has been accepted by all the High Courts. Except in *Narain Das* v. *Lalta Prasad*[1] and later decisions of the same High Court, the principle laid down by the Privy Council in *Thakur Sri Radhakrishna* v. *Ram Bahadur*[2], *viz.*, that symbolical delivery momentarily interrupts the possession of the judgment-debtor, has been applied equally to those who derive through him. The matter was considered in *Ram Prasad Obja* v. *Bakshi Bindeswar Prasad Sinha*[3], where *Narain Das* v. *Lalta Prasad*,[1] was dissented from. The decision in *Ram Prasad Obja* v. *Bakshi Bindeswar Prasad Sinha*[3] has ever since been followed consistently by the Patna High Court, the last case being *Krishna Prasad* v. *Adayanath Chatak*[4]. The Lahore High Court holds a similar view, as can be seen from *Harbagwan* v. *Taja*[5] and *Mahomed Saadat Ali Khan* v. *Punjab National Bank, Ltd., Lahore.*[6] The Calcutta High Court, too, has consistently held the same view and dissented from *Narain Das* v. *Lalta Prasad*[1]. The matter has not yet apparently come before the Bombay High Court for decision. Prior to *Thakur Sri Radhakrishna* v. *Ram Bahadur*[2], that High Court was of the opinion that symbolical delivery in no case interrupted adverse possession ; but recently, the learned Judges of that Court have pointed out the necessity for reconsidering the earlier Bombay decision in the light of *Thakur Sri Radhakrishna* v. *Ram Bahadur*[2]. The matter has not come directly before this Court ; but in *Kamayya* v. *Mahalakshmi*,[7] a Bench of this Court interpreted and clarified the decision in *Thakur Sri Radhakrishna* v. *Ram Bahadur*[2] which overruled a decision of Devadoss, J., based on the Bombay and Allahabad decisions and dissenting from the Patna cases. The learned Judges referred to the Patna and Calcutta decisions and agreed with them. Because of this preponderance of judicial opinion in favour of the view that a person who claims through a judgment-debtor is in no better position than a judgment-debtor himself, and in consonance with the general reasoning adopted in *Kamayya* v. *Mahalakshmi*,[7] I must agree with the Courts below that the suit was not barred by time.

This second appeal is dismissed with costs.

B.V.V. *Appeal dismissed.*

---

1. (1899) I.L.R. 21 All. 269.
2. (1917) 34 M.L.J. 97 (P.C.).
3. (1931) I.L.R. 11 Pat. 165.
4. A.I.R. 1944 Pat. 775.
5. A.I.R. 1926 Lah. 35.
6. (1940) I.L.R. 22 Lah. 428.
7. (1927) 53 M.L.J. 339.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Srimat Sree Vidya Sankara Bharath Swamivaru, Trustee of Sri Chandramouleswara Swamivaru of Pushpagiri Mutt, represented by power of attorney agent, E. Sitaramayya .. *Appellant**

v.

Popuri Ramamurthi and others .. *Respondents.*

Madras Estates Land (Amendment) Act (II of 1945), sections 2 and 4—Amendment contained in section 2 (1) not only retrospective but also ex-proprietary—Proper construction of section 4—Its meaning and effect.

Explanation (1) to clause (*d*) of sub-section (2) of section 3 of the Madras Estates Land Act added by section 2 of the Madras Estates Land (Amendment) Act (II of 1945) is on the face of it not only retrospective but also ex-proprietary.

Section 4 of the Amending Act which provides that "nothing contained in this Act shall be deemed to invalidate any decree or order of a Court which became final before the passing of this Act" only means, that the amendment shall not be allowed to upset or affect any decree or order of a Court which has become final prior to that date in so far as rights and obligations have sprung up in favour of or against parties to those decrees. This does not mean that any finding on the basis of which those decrees or orders were reached must also be upheld for all time to come in spite of legislation affecting that very basis.

The question for decision was whether certain lands situated in an Agraharam formed part of an 'estate.' In an earlier litigation between one of the parties and the predecessor in title of the other, it was finally held in 1921, that the Agraharam in question was not an 'estate.' On the contention that the Madras Estates Land (Amendment) Act (II of 1945) could not be deemed to have affected this view taken by the Court long before 1936.

Held, negativing such a contention, that the aid of section 4 of the Amending Act could not be invoked to say that even the basis of the prior decision which the legislature has changed by that very Act should still remain unaffected even as regards the determination of future rights and obligations between the parties.

Appeals against the orders of the Court of the Subordinate Judge, Guntur, in A. S. No. 147, etc., of 1942, respectively preferred against the orders of the Court of the District Munsiff of Gurzala in O. S. No. 59, etc., of 1942, respectively.

M. Seshachalapathi for Appellant.

K. Bhimasankaram and *P. Ramamurthi* for Respondents.

The Court delivered the following

JUDGMENT.—These three appeals have been preferred by the landholder, which is the Pushpagiri Mutt, against an order of the Subordinate Judge directing the plaints to be returned for presentation to the Revenue Court as the lands in respect of which the suits have been brought form part of an "estate."

Both the Courts have held that the Lingamguntla Agraharam in which the lands are situated is an "estate." The District Munsiff dismissed the suits on this finding but the Subordinate Judge directed the plaints to be returned, which, of course, is the proper order to make, if the finding is correct.

It is contended for the appellant that as the grant to the mutt was not of an entire village, but only of part of a village, there having been minor inams at the time which were not subject-matter of the grant, the agraharam cannot be called an "estate" within the meaning of the Act and according to the decisions of this Court. It is to meet these decisions that legislation was undertaken and Madras Act II of 1945 came to be passed amending the Madras Estates Land Act, 1908, and enacting in Explanation 1 to clause (*d*) of sub-section (2) of section 3 that the "area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village which have already been granted on service or other tenure or been reserved for communal purposes" and providing that the amendment "shall be deemed to have had effect as from the date on which the Madras Estates Land (Third Amendment) Act, 1936, came into force." Therefore the point that the grant was not of the entire village and it did not include certain lands which formed part of the village is of no avail to the appellant, unless he is able to steer clear of this legislation.

* A. A. O. Nos. 375 to 377 of 1943. 2nd April, 1945.

How Mr. Seshachalapathi, the learned advocate for the appellant, has tried to do it is by invoking the aid of section 4 of the Amending Act which provides "Nothing contained in this Act shall be deemed to invalidate any decree or order of a Court which became final before the passing of this Act." He relies on the circumstance that as early as 1921 it was finally held by the High Court in a suit between the mutt and the predecessor in title of the defendant tenant that the Lingamguntla Agraharam is not an "estate." This is referred to in Ex. P-13 a judgment of Sundaram Chettiar, J., dated 8th August, 1923. So, he contends that as it has been finally held that Lingamguntla is not an "estate" the new legislation cannot be deemed to affect this view taken by the Courts long before 1936.

This, however, does not appear to me to be the correct construction of section 4. What it apparently means is that the amendment shall not be allowed to upset or affect any decree or order of a Court, *i.e.*, it would not be open, because of this legislation, for a party to come up and say for instance "There was a decree for rent passed against me in a Civil Court. The Act says my land is an estate and therefore that decree must be reversed and I must get back what was decreed against me" or it would not be open for a tenant to come forward and contend "The landholder recovered possession of certain properties from me on the ground that I had no occupancy rights, but now that the Act says the village is an estate conferring occupancy rights on me, I should get back possession of the lands." To put it in another way, decrees or orders which have become final shall stand unaffected by the Act in so far as rights and obligations have sprung up in favour of or against parties to those decrees or orders, but this does not mean that any finding on the basis of which those decrees or orders were reached must also be upheld for all time to come in spite of a legislation of this kind which is on the face of it not only retrospective but also ex-proprietary. It is one thing to say that what was decreed or ordered previously shall stand ; it is another thing to say that the basis of the decree which the legislature has definitely made up its mind to change should still remain unaffected even as regards the determination of future rights and obligations between the parties.

I hold that the Amending Act is a conclusive answer to these appeals which must be dismissed with costs only in C. M. A. No. 377 of 1943 where the respondent appears. There will be no order as to costs in the other appeals where the respondent does not appear. No leave.

V.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Makineni Virayya and others .. *Appellants**

v.

Madamanchi Bapayya .. *Respondent.*

Hindu Law—Widow—Transfer of property in favour of daughter and grand-daughter—Maintenance deed executed in return—Property partitioned between donees' heirs—Person taking benefit under—Alienations effected by—Succession to widow as reversionary heir—Suit for recovery of property ignoring previous transfers by the other heir—Applicability of principles of estoppel or election.

A Hindu widow executed a *dakhal* deed whereby she transferred the properties inherited by her from her husband. The deed recited that her husband had made arrangements to the effect that she should enjoy during her lifetime the entire moveable and immoveable property belonging to him and that after his lifetime one-half of his property should pass to his daughter and the other half to his grand-daughter with right of absolute disposal. The deed further provided as follows : "According to the arrangement effected by him the entire property is being enjoyed by me ever since. Hence as I have now become old and as I have no ability to get the lands cultivated I have relinquished the right possessed by me during my lifetime . . . . and I have on this date delivered possession of the same to you . . . . You shall both enjoy the said property in equal halves with rights of gift, exchange and sale from son to grandson and so on in succession. You shall maintain me during my lifetime and you shall cause the obsequies which have to be performed to me after my death to be performed by *K.* . . ." This deed was followed by the execution of a maintenance deed in favour of the widow by the daughter and grand-daughter, the donees under the previous deed. The

* S. A. No. 1125 of 1944. 27th April, 1945.

later deed also recited the arrangement said to have been made by the husband and provided that a certain sum should be paid by them once in a year to the widow during her lifetime and that her obsequies should be duly performed after her death. The donees having died subsequently leaving the plaintiff and the first defendant as their heirs, their fathers acting as their respective guardians sold one of the items of immoveable property comprised in the *dhakal* deed. The rest of the properties were partitioned between them. The plaintiff later on attained majority and sold all the immoveable properties allotted to his share at the partition. The widow having died subsequently the plaintiff, as her reversionary heir, sued to recover the properties of the widow after avoiding the alienations. The defendants contended that by reason of the plaintiff having recognised and elected to take the full benefit of the title conferred by the *dhakal* deed he was estopped from disputing its validity.

Held, that the plaintiff was not precluded either by estoppel or by election from claiming the properties in suit as the reversionary heir of the last male holder.

Appeal against the decree of the Court of the Subordinate Judge, Guntur, in A. S. No. 30 of 1943, preferred against the decree of the Court of the (Principal) District Munsiff, Guntur, in O. S. No. 153 of 1940.

V. Govindarajachari and *B. S. Ramachandra Rao* for Appellants.

P. Satyanarayana Rao and *K. Krishnamurthi* for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—The only question raised in this second appeal is whether the plaintiff-respondent is precluded by his individual conduct from claiming the properties in suit as the nearest reversionary heir of his maternal grandfather, one Makineni Buchayya, who was the last full owner. Both the Courts below have held that he is not and passed a decree for delivery of possession. The defendants 1 to 3, 5 and 6 have preferred this appeal challenging the correctness of that decision.

The following table will show the relationship of the parties one to another :

Buchayya : Lakshmi Devi
(d. 1900) (d. 21-5-1930)

Mangamma (predeceased Buchayya) — Subbamma (d. 1906)

Venkatasubbamma (d. 1906) — Bapayya (Plaintiff)

Veerayya (first defendant)

On the 4th January, 1904, Lakshmi Devi executed a *dakhal* deed (Ex. D-1) whereby she transferred the properties inherited by her from her husband Buchayya. The deed recites that her husband, while in a sound state, made arrangements to the effect that she should enjoy during her lifetime the entire moveable and immoveable property belonging to him, and that after her lifetime one half of the property should pass to his daughter Subbamma and the other half to his grand-daughter Venkatasubbamma with right of absolute disposal, and proceeds as follows:

"According to the arrangement effected by him, the entire property is being enjoyed by me ever since. Hence as I have now become old and as I have no ability to get the lands cultivated, I have relinquished the right possessed by me during my lifetime in respect of the moveable and immoveable property worth Rs. 1,000 which has been in my possession and enjoyment and is described in the schedule hereunder, and I have on this date delivered possession of the same to you . . . . You shall both enjoy the said property in equal halves with rights of gift, exchange and sale from son to grandson and so on in succession . . . . . You shall maintain me during my lifetime and you shall cause the obsequies which have to be performed to me after my death to be performed by Krishnayya the husband of Makineni Venkatasubbamma of you."

This was followed by the execution, on the 8th January, 1904, of a maintenance deed (Ex. D-2) in favour of Lakshmi Devi by her daughter and grand-daughter, the donees under Ex. D-1. This deed also recited the arrangement said to have been made by the husband of Lakshmi Devi and the *dhakal* deed executed by the latter, and provided that Rs. 50 per annum should be paid by the donees in equal halves to Lakshmi Devi during her lifetime and that her obsequies should be duly performed after her death. The donees died in 1906 and, in 1907, the father of the plaintiff and the father of the first defendant acting as their respective guardians sold one of the items of immoveable property comprised in the *dhakal* deed. The rest of the properties appear to have been partitioned in equal shares and enjoyed separately

by the plaintiff and first defendant. The plaintiff, who was a minor when all these transactions took place, attained majority in or about 1913. Thereafter by four sale deeds (Exs. D-6 to D-9) ranging from 1919 to 1928 the plaintiff sold all the immoveable properties allotted to his share at the partition aforesaid, and these deeds recited that the properties passed to his mother Subbamma under the *dhakal* deed executed by Lakshmi Devi and subsequently to him on his mother's death, and they purported to convey absolute title to the respective vendees in the properties sold. Lakshmi Devi died on the 21st May, 1930, and the plaintiff claiming to be the nearest reversionary heir of his maternal grandfather Buchayya brought the suit out of which this second appeal arises for recovery of the properties in the hands of the first defendant and his alienees who were impleaded as defendants 2 to 5. The fourth defendant died pending suit and is now represented by the sixth defendant.

The plaintiff alleged that Buchayya died intestate leaving him surviving his widow Lakshmi Devi and his only surviving daughter Subbamma, that all his properties were inherited by his widow who had only a limited estate and passed to him on her death as the nearest reversioner of Buchayya entitled to succeed to his estate. He charged that Lakshmi Devi, with the intention of benefitting her daughter's daughter Venkatasubbamma who would, in no event, be entitled to any share in Buchayya's properties, falsely set up an oral arrangement by her husband as recited in the *dhakal* deed of 1904 and released all the properties to her and to her daughter Subbamma who, in consideration of her getting immediate possession of some of the properties, waived her objections to the transactions. He averred that Buchayya gave no directions regarding his property before he died, as falsely recited in the *dhakal* deed, and, Lakshmi Devi having only a widow's limited interest in the property had no right to relinquish her interest in equal shares to her daughter and grand-daughter so as to bind him as the ultimate male reversioner to the estate of Buchayya. The defence, in the main, was that before his death Buchayya gave "oral testamentary directions" giving a life estate in his properties to his wife and vested remainders to Subbamma and Venkatasubbamma and that the gift under the *dhakal* deed was expressly based upon the said testamentary directions. It was also pleaded that by reason of the plaintiff having "recognised and elected to take the full benefit of the title conferred by the deed of the 4th January, 1904" he was estopped from disputing its validity and could not seek "to approbate and reprobate the same" and that, in any event, the transaction operated as a family arrangement binding upon the plaintiff. The District Munsiff of Guntur who tried the suit found that no oral testamentary disposition by Buchayya was made out and that there was no true basis for a family arrangement as there were no disputed claims to settle. He also overruled the other pleas raised by the defendants and decreed the suit, and that decree was affirmed on appeal by the Additional Subordinate Judge of Guntur. Hence this second appeal.

On behalf of the defendants, appellants, Mr. Govindarajachari did not challenge the finding as to Buchayya's oral will, as indeed he could not, it being a pure question of fact. Nor did he attempt to support the *dhakal* deed of 1904 as a family arrangement binding on the plaintiff. His contention was that the plaintiff was precluded by reason of his conduct in dealing with the properties which his mother got under the *dhakal* deed and which subsequently passed to him, from claiming any part of the properties covered by the deed on a title different from and inconsistent with the title on which the dispositions in the deed were based. He put the matter from different points of view; estoppel, election and affirmation or ratification, citing numerous Indian and English decisions to support his argument. We find ourselves, however, unable to accept the contention. Whichever way the plaintiff's conduct may be viewed, we are of opinion that there is nothing in it to preclude him from enforcing the legal rights which on the finding that Buchayya died intestate, undoubtedly accrued to him when Lakshmi Devi died in 1930.

In considering this question, it is necessary to bear in mind these important facts: (1) under the *dhakal* deed Lakshmi Devi did not purport to convey anything

more than a life interest in the properties. She no doubt recited the oral arrangement by her husband already referred to as being the source of her title, but if, as has been found, the said arrangement was not true, her interest in the properties was the limited interest of a Hindu widow which undoubtedly would pass to her donees under the *dhakal* deed. The point to note is that she did not purport to convey to her donees any interest in the properties which would enure beyond her lifetime, but only asserted that they had a vested remainder in the properties under her husband's oral will, an assertion which has been held to be unfounded. (2) The plaintiff did not *directly* take any benefit under the *dhakal* deed. He merely succeeded to the properties given to his mother under the deed. (3) He is not attacking the *dhakal* deed as void and inoperative to convey any title to his mother, but seeks only to impugn its recitals in so far as they are inconsistent with his claim to succeed to Buchayya as his reversioner on Lakshmi Devi's death. And (4) the plaintiff is not suing to recover the properties from his own alienees to whom he had sold them absolutely before Lakshmi Devi's death, but seeks to recover the other properties which were given to Venkatasubbamma under the *dhakal* deed and which are now in the hands of her son the first defendant and his alienees, as being part of Buchayya's estate of which Lakshmi Devi's disposition would not enure beyond her lifetime.

On these facts it is manifest that there can be no estoppel by representation affecting the plaintiff's claim. To his own vendees he may no doubt be considered to have represented that he had an absolute interest in the properties conveyed on the basis of the recitals in the *dhakal* deed of 1904, but he cannot be taken to have represented to the first defendant or his alienees expressly or by his conduct that those recitals were true or to have caused them to believe and act on such recitals. Indeed Mr. Govindarajachari did not seriously argue that there was any estoppel by representation in the circumstances of this case, and it is unnecessary to pursue it further. He argued, however, that the present case fell within the principle laid down in *Rangaswami Goundan* v. *Nachiappa Goundan*[1] and further expounded and applied in *Ramakotayya* v. *Veeraraghavayya*[2] *Subbaraghava Rao* v. *Adinarayana Rao*[3] *Fateh Singh* v. *Thakur Rukmini Ramnaji Maharaj*[4], *Akkava* v. *Sayad Khan Mitekhan*[5] and *Ramgowda Annagowda* v. *Bhau Sahib*[6]. These decisions will be found on examination to proceed on the principle that an alienation by a Hindu widow without justifying necessity is not void but only voidable at the instance of the reversionary heir who may either affirm or avoid it, but will be precluded from questioning it if he does something which amounts to an affirmation of the transaction. Such election to hold the sale good, as it has sometimes been expressed, may, it has been held, take place even before the death of the widow while the reversionary heir was only a presumptive reversioner. Can it be said that this principle has any application here? As we have already observed, the widow conveyed only her life interest, though she purported to derive it under her husband's alleged oral will. The *dhakal* deed did not purport, *proprio vigore*, to transfer any absolute interest in the properties to the donees. It postulated an arrangement by the husband under which they already had an absolute interest in remainder to take effect after the widow's death. The deed was therefore neither void nor voidable at the instance of the actual reversioner, but was valid and operative to vest in the donee the widow's right to possession and enjoyment during her lifetime and it ceased by its own terms to have any operation after her death. It was an alienation which, so far as the interest it purported to convey was concerned, was within her competence to make. In such circumstances, we are of opinion that there is no room for the application of the principle referred to above.

It was said that the plaint proceeded on the footing that the *dhakal* deed was an alienation by the widow in excess of her powers which the plaintiff was entitled

1. (1918) 36 M.L.J. 493 : I.L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
2. (1928) 56 M.L.J. 755 : I.L.R. 52 Mad. 556 (F.B.).
3. (1932) M.W.N. 491.
4. (1923) I.L.R. 45 All. 339 (F.B.).
5. (1927) I.L.R. 51 Bom. 475 (F.B.).
6. (1927) 53 M.L.J. 350 : I.L.R. 52 Bom. 1 (P.C.).

to avoid as the reversionary heir, and in this view the principle would apply. There is no force in this suggestion. The plaintiff no doubt attacked the *dhakal* deed, as representing a collusive scheme devised by the widow and the donees in order to give some of the properties to Venkatasubbamma and on that account not binding on him as the reversioner of Buchayya who, he alleged, died intestate. The attack, as we read the plaint, was against the recitals in the deed and the collusive character of the transaction rather than against the actual disposition made thereunder which could not prejudicially affect the plaintiff's title as reversionary heir.

Mr. Govindarajachari next called in aid the principle of the well known case of *Dalton* v. *Fitzgerald*[1], and argued that the plaintiff having taken and dealt with the properties given to her mother under the *dhakal* deed was estopped from disputing the validity of any of its dispositions. The argument derives no support from the decision cited and is, in our opinion, unsound. In that case, the trustees under the will of a testator who had no title to certain lands, settled them on *A* for life with remainders over to *B* and others. *A* entered into possession of the lands as tenant for life and, after continuing in possession long enough to acquire title by adverse possession, died making a will devising the lands to *C*. *B* then brought the suit claiming as remainderman to recover possession from *C*, and the Court upheld the claim. Lindley, L.J., rested the decision mainly on the true effect of adverse possession for the statutory period, pointing out that it perfected the title not of the person who happened to be in possession at the time when the period of limitation expired, but of the one whose possession started time running against the true owner, with the result that the will in that case became operative as if the testator had title at the time when it was made, and *B's* title as remainderman prevailed against *C* claiming under the tenant for life. Lopes, L.J., put it on the ground of estoppel. The rule was stated thus :

"A person having no title to land settles it on *A* for life with remainder to *B*. *A* enters and takes possession and deals with the property as tenant for life, that person is estopped from telling the truth—his mouth is shut; he has availed himself of the settlement for the purpose of obtaining possession of the land, and he cannot afterwards seek to invalidate that which enabled him to obtain possession, and this though subsequently he may have acquired a good title. If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question and if he remains in possession till twelve years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed."

Rigby, L.J., expressed the same view. It will be seen that the estoppel was there applied against *A's* privy *C* with reference to the property obtained by *A* under the settlement. *C's* "mouth was shut" so as to prevent him from "telling the truth" *viz.*, that the will and the settlement did not operate to pass "the land in question." But could it be held that *A* in that case, if he was the testator's heir-at-law, would be estopped from denying the trustee's title to other properties not conveyed to him but settled under the same deed on other persons, on the ground, say, that the will was not genuine? We think not. And that is the position here, for, as already stated, the plaintiff does not seek to set up a different title to the lands which were given to his mother under the *dhakal* deed and which on her death passed to him, but impugns the title of the first defendant to the lands given to Venkatasubbamma under the same deed, on the ground that the "arrangement" by Buchayya recited in the deed is not true. As pointed out by Blackburn, J., in *Board* v. *Board*[2] which was approved and followed in *Dalton* v. *Fitzgerald*,[1] the estoppel applicable in such cases is like that which precludes a tenant from denying his landlord's title and which in this country is embodied in section 116 of the Evidence Act. No authority has been brought to our notice extending the tenant's estoppel to other properties of the landlord although the latter may hold them under the same title as the one demised. Furthermore, as we have already pointed out, the *dhakal* deed purports to convey only Lakshmi Devi's life interest which in any

1. (1897) 2 Ch. 86. 2. (1873) 9 Q.B. Cases 48.

case she possessed as a Hindu widow in her husband's estate, and we fail to see how the title which the plaintiff now seeks to set up as the reversioner entitled to succeed on the widow's death is in any way inconsistent with or "against the deed." It is no doubt, inconsistent with the alleged disposition of the properties by Buchayya. But, to hold that the plaintiff, who was an infant at the time and could have known nothing personally about the truth or otherwise of such disposition, is estopped from setting up his undoubted legal rights to properties not taken by him under the deed, on the strength merely of his having dealt with certain other properties as properties got by his mother under the deed and inherited by him as her heir would, in our opinion, be an unwarranted extension of the doctrine of *Dalton* v. *Fitzgerald*[1].

It was said that, inasmuch as the deed purported to convey Buchayya's properties on the footing that he had made an oral will, the donees and their privies must be deemed to have taken under such will. We see no reason to make such supposition which ignores that the widow had, in any case, a life interest which passed under the deed. But supposing it were so, the defendants would be in no better position; for, as we have indicated already, if a person purports to enter into possession of certain properties under a will believing it to be true and thereafter discovers that it is not true, there is no apparent reason why he should be precluded from claiming *other* properties purported to be disposed of under the will as the heir-at-law of the alleged testator. It would seem that even if he took as a tenant for life in such circumstances he would not be estopped from setting up his title as heir-at-law as against the remainderman. Lindley, L.J., observed in *Dalton* v *Fitzgerald*[1]:

"No doubt a person may by mistake treat himself as tenant for life of property of which he is himself the owner and such a mistake can be set right unless he has so acted as to render a rectification of the mistake unjust to others."

A fortiori where the true claim is put forward against persons purporting to take *other* properties under the will. Reference may also be made in this connection to *Anderson*, In re: *Pegler* v. *Gillatt*[2], where Buckley, J., as he then was, held that a devisee of a life estate in two properties, one of which was validly disposed of under the will and the other not, can set up the invalidity of the will as to the latter so as to defeat the remainderman, distinguishing *Dalton* v. *Fitzgerald*[1].

Mr. Satyanarayana Rao for the plaintiff referred to *Alamelu Ammal* v. *Balu Ammal*,[3] where on somewhat analogous facts Sadasiva Aiyar, J., refused to apply the principle of *Dalton* v. *Fizgerald*[1]. A Hindu widow made a will bequeathing the properties inherited from her husband to her three daughters absolutely, and the daughters entered into possession under the will and divided the properties into three equal shares, each taking one share as her absolute property. On the death of one of them, however, the survivors sued as heirs of their father for recovery of the third share from the daughter of the deceased daughter and the learned Judge was of opinion that they were not estopped. The other learned Judge, Napier, J., however expressed no opinion on the point, concurring merely in dismissing the suit on the ground that the partition made between the daughters extinguished the right of survivorship as between them.

Lastly it was urged for the defendants that here was a case of election, for, the plaintiff, having taken the benefits given under the *dhakal* deed could not claim, adversely to the deed, other properties disposed of under it. It was said that a man shall not take both by the deed and against the deed or approbate and reprobate. On the facts of this case, there can be no question of election in the strict sense of the doctrine, for at the time when the plaintiff is supposed to have made his election he could not have given up the property which he now claims as he became entitled to it only long after. And, moreover, for the purpose of this doctrine the person sought to be precluded from setting up his right must have taken some benefit *directly* under the instrument. Lord Romilly, M.R., observed in *Brown* v. *Brown*,[4]

1. (1897) 2 Ch. 86.
2. (1905) 2 Ch. 70.
3. (1914) 28 M.L.J. 685 : I.L.R. 43 Mad. 849.
4. (1866) 2 Eq. Cases 481.

"This is according to the ordinary rule in cases of election, as, for instance, if a person disposes of the property of *A*, by his will, *A* cannot take the benefits given to him under the will without giving up the property which the testator has disposed of; but if it happens that the legatee or devisee of other property disposed of by the will, leaves that property to *A*, or dies intestate, and *A*, as his heir-at-law or next of kin, acquires some of the property disposed of by the will of the testator, then no case of election arises at all, because *A* takes it independently and by a separate and distinct course. That is a principle well recognised in all cases of election, and would, if the plaintiff were in a similar position, apply here."

Here the plaintiff did not take any benefit *directly* under the *dhakal* deed but only as the heir of his mother after she died in 1906, while he now claims directly through the last full owner Buchayya.

We consider, therefore, that plaintiff is not precluded either by estoppel or by election from claiming the properties in suit as Buchayya's reversionary heir, and we accordingly dismiss the second appeal with costs.

B.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Dronamraju Seshagiri Rao .. *Appellant**

v.

Godithi Rammayya and others .. *Respondents.*

Madras Estates Land Act (I of 1908), section 3 (2) (b) and (e) and section 3 (16) and Amendment Act (II of 1945)—Mokhasa lands—Suit for recovery of rent and for ejectment—Civil Court's jurisdiction—Whether exists.

In a suit filed by certain mokhasadars of two villages against tenants for recovery of rent and for ejectment, the tenants pleaded that they had occupany rights in the lands as they formed part of an "estate" within the meaning of the Madras Estates Land Act and that the Civil Courts had no jurisdiction. On the question whether the lands formed really part of an "estate",

Held, that in the circumstances they formed part of an "estate" under clauses (*b*) and (*e*) of sub-section (2) of section 3 of the Act and the civil Court had no jurisdiction in the matter.

What had been made an "estate" by reason of sub-clauses (*b*) and (*e*) of sub-section (2) of section 3 could not have been intended to be deprived of its character by the definition of "ryoti land" in sub section (16) of section 3. If the lands are held under a tenure which the landholder can put an end to by a unilateral act of his own, the Act says that the tenant holding possession of such a land does not possess occupancy rights therein but, if the land is held under a tenure which cannot be terminated by the landlord, then it is held on a permanent under-tenure and is an "estate" within the meaning of the Act.

Appeals against the orders of the District Court, West Godavari, at Ellore, dated 14th October, 1942, in I. A. No. 37 of 1942, in A. A. O. No. 25 of 1941 and in I. A. No. 38 of 1942, in A. A. O. 26 of 1941, respectively, etc.

P. Satyanarayana Rao for Appellant in A. A. O. Nos. 157 and 158 of 1943 and Petitioner in C. R. P. No. 541, etc., of 1943.

E. Venkatesam for Petitioner in C. R. P. No. 1506 of 1943, etc.,

K. S. Desikan and *Srimathi Sitamahalakshmi* for Petitioner in C. R. P. No. 541 of 1943.

V. Viyyanna for Respondents in all.

The Court delivered the following

JUDGMENT.—These two civil miscellaneous appeals and eight civil revision petitions are connected. I shall deal with the revision petitions first as all of them raise the same point.

The mokhasadars of Chilakapadu and Muppavaram filed suits in the District Munsiff's Court of Tanuku against their tenants for the recovery of rent and for ejectment. The tenants pleaded that they had occupancy rights in the lands as they form part of an "estate" within the meaning of the Estates Land Act and that the Civil Courts had no jurisdiction. This plea was upheld by the District Munsiff who directed the plaints to be returned for presentation to the proper Court. On

---

* A. A. O. Nos. 157 and 158 of 1943; 22nd February, 1945.
C. R. P. Nos. 371 of 1944 and 541, etc., of 1943.

appeals preferred by the mokhasadars, the Subordinate Judge of Ellore, reached the same conclusion and confirmed the decrees of the District Munsiff. These revision petitions are from the decision of the Subordinate Judge and raise the question whether the lands form part of an estate in which the defendants have occupancy rights. It was contended for the petitioners that the lands were not part of an estate for two reasons: firstly, because clause (*d*) of section 3 (2) of the Estates Land Act will not apply as there is nothing to show that the grant was of an entire village and secondly, that clause (*e*) of section 3 (2) is not applicable, as the grant was only of specific lands in the villages and not of one or more villages of any of the estates specified in clauses (*a*), (*b*) and (*c*).

The first ground has ceased to be available to the petitioners because of the new Madras Act II of 1945 which enacts that "where a grant as an inam is expressed to be of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes." Therefore even in a case where we find that certain lands in a named village were not included in the grant for some reasons, the land granted as inam would still be an estate.

Sub-clause (*e*) of section 3 (2) speaks of "any portion consisting of one or more villages of any of the estates specified above in clauses (*a*), (*b*) and (*c*) which is held on a permanent under-tenure." The contention of the petitioners is that in the cases before us we have not got an entire village or villages forming part of the estates as defined in sub-clauses (*a*), (*b*) and (*c*) and which are held on a permanent under-tenure. In support of this contention, reliance was placed on the entries in the inam fair register and the inam statement printed in C. R. P. No. 1506 of 1943. The inam fair register is Ex. I and the inam statement is Ex. I-a. Mr. Satyanarayana Rao referred to the fact that, besides giving the total extent comprised in the mokhasa grant, the inam register specifies the several numbers of the fields also which is consistent only with the theory that the villages, Chilakapadu and Muppavaram, in their entirety, were not treated as the subject of the mokhasa grant but only some fields in those villages. He further referred to the fact that the numbers of the fields were not consecutive and some numbers like 12, 13, 18, 28, 32, 33, etc., in Chilakapadu and numbers 4, 6, 20, 28, 37, 38, etc., in Muppavaram were omitted. Such an inference, *viz.*, what was granted is not the entire village of Chilakapadu or Muppavaram but only certain fields in those villages—does not appear to me to be warranted by the entries. The register and the statement speak of the villages as mokhasa and the boundaries given indicate that the grant comprised the villages themselves. It was necessary for those who prepared the inam register to specify the extents and the fields for the purpose of arriving at the cist or jodi that had to be paid as it was then believed that these mokhasas were excluded from the assets of the zamindari at the time of the permanent settlement and that the Government had the right of reversion. Subsequently this belief was found to be ill-founded and the Government gave up further steps as regards the mokhasa grants in pursuance of reports made by the Commissioner (Mr. Taylor) on enquiries made by the Board of Revenue of the Collector and the final sanction of the Secretary of State on a letter addressed to him by the Madras Government about the true state of affairs which turned out to be that these mokhasa grants were included in the assets when the peshcush was calculated.

The Subordinate Judge has in this connection rightly drawn attention to the fact that in Exs. X and XI, these villages are entered under the heading of mokhasa villages. The omission of certain numbers in the inam register is explicable on the basis that they perhaps relate to the devadayam and other inams of a like nature which could not be taken into account in settling the jodi or quit rent. Ex. I refers in column 4 to certain inams and gives the extent as 12-12. In Ex. I-a under column 9 we get the real clue for answering this question. The total extent of Chilakapadu village is given as 48-4-1 kandies. Out of this, some extent is deducted for porombokes and out of the remainder two extents are deducted under the head

of *dharmadayam* and service inams. The remainder is the mokhasa grant. Similarly with reference to Muppavaram. This shows fairly clearly that the villages were the subject of the grant excluding of course, *dharmadayam* and service inams. Therefore, I am of the opinion that clause (e) applies to the facts of this case.

Assuming for any reason that it does not, the mokhasa grant will come within clause (*b*), as it is a portion of a permanently settled estate in Nuzwid. It is undoubtedly, therefore, an " estate " within the meaning of the Act. But it was urged that this does not by itself oust the jurisdiction of the Civil Court because of the fact that the mokhasa grant is of the nature of a service tenure and the definition of " ryoti land " as given in the Act excludes mokhasa grants. Sub-clause (16) (*c*) of section 3 provides that " ryoti land " does not include "lands granted on service tenure either free of rent or on favourable rates of rent if granted before the passing of this Act or free of rent if granted after that date, so long as the service tenure subsists." The position taken for the petitioners is that in a case where the grant is irresumable and is permanent, the service tenure still subsists either because it had not been put an end to, or because it could not be put an end to, and therefore the land is not ryoti land and the landholder cannot bring a suit for rent or ejectment in a revenue Court. This argument is, however, based upon a double fallacy. We have nothing whatever to do with the question whether the mokhasa as such is resumable or irresumable service tenure. We are concerned with lands in a mokhasa village and the question is whether those lands form part of an estate. Obviously they do, for the reasons already given. If the particular lands in respect of which the suits are brought for rent or ejectment have been granted on service tenure, it is no doubt true that they may not be " ryoti land " within the meaning of the Act. But there is no allegation in this case that the lands in question are held under any such tenure. Whether the mokhasa grant is itself on the basis of a service tenure is a question which does not concern us. Secondly, sub-clause (*c*) of sub-section (16) of section 3 clearly contemplates a case where the service tenure is of such a nature as can be put an end to. If it is permanent and irresumable, it falls within clause (*e*) of sub-section (2) of section 3. What has been made an " estate " by reason of sub-clauses (*b*) and (*e*) of sub-section (2) of section 3 could not have been intended to be deprived of its character by the definition of " ryoti land " in sub-section (16) of section 3. If the lands are held under a tenure which the landholder can put an end to by a unilateral act of his own, the Act says that the tenant holding possession of such a land does not possess occupancy rights therein but, if the land is held under a tenure which cannot be terminated by the landlord, then it is held on a permanent under-tenure and is an "estate" within the meaning of the Act.

In the inam fair register there is a note under column 21 that the two villages of Chilakapadu and Muppavaram stand on the same footing as the mokhasa villages of Gotenu, Komavaram and Surampudi. The inam register extract of these three villages has been filed as Ex. II and it is the same as Ex. I as regards the features relied on for the petitioners, namely, the giving of the numbers of the fields and the omission of certain numbers. *Veeraswami* v. *Seetharama Kanthayya*[1] was a case which dealt with lands in those three villages and it was held that they were an " estate " within the meaning of the Act. The case in *Sadasivarayudu* v. *Venkitaswami*[2] relied on by the petitioners was an instance of a resumable service granted and has no application to the facts before us. A holding in another mokhasa village called Arungolanu within the ambit of the Nuzvid zamindary was the subject-matter of the decision in *Lakshminarasimham* v. *Veerabadrudu*[3] and there also the same conclusion was reached. The Privy Council decision in *Narayanaraju* v. *Suryanarayudu*[4] is authority for the position that the mokhasadar is himself the landholder within the meaning of the Act ; and the cultivating tenants under them are in the position of ryots with occupancy rights in respect of the holdings in their possession;

1. (1926) 51 M.L.J. 394.
2. (1931) 62 M.L.J. 598.
3. (1923) 19 L.W. 671.
4. (1939) 2 M.L.J. 901 : L.R. 66 I.A. 278 : I.L.R. (1940) Mad. 1 (P.C.).

unless it can be shown that the lands are held by them under a service tenure which the landholder can resume or put an end to.

The civil miscellaneous appeals are from the orders of the District Judge in two cases refusing to set aside orders of dismissal passed by him in two civil miscellaneous appeals on memos filed that they had been adjusted out of Court. Some of the trustees interested in a temple, which was the landholder, compromised the matter with the tenants and reported the cases as settled. Other trustees who were not the managing trustees at the time and whose right to become trustees in rotation would arise only later, applied for the dismissal being set aside, stating that the compromise was effected without their being consulted and it was therefore not binding against them. The District Judge negatived their prayers on the ground that the action of the managing trustees in reporting adjustment was final and binding on the petitioners. Whether this view is right or wrong, is really unnecessary to consider now, for the simple reason that it has been held even on the merits that the lands form part of an estate ; and this would be the conclusion which would have been reached even if the appeals had been heard instead of being dismissed on the basis of a reported compromise or settlement.

For the reasons given above, the two civil miscellaneous appeals and the several civil revision petitions will be dismissed with costs.

No leave.

K.C. — *Appeals and Petitions dismissd.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

S. S. Narayanaswami Aiyar .. *Appellant**

v.

Alamelu Ammal and another .. *Respondents.*

Bombay Co-operative Societies Act (VII of 1925), section 26—Scope of the exemption from attachment under—Member of the society transferring his life insurance policies to it as security for amounts borrowed—Death of the member—Sum standing to the credit of member after adjustment of amounts due to the society—Right of the creditor of the member to attach it as against the claim of a nominee of the member in the society.

In making provision against attachment of amounts in the hands of the society at the instance of a creditor of a member, the legislature has under section 26 of the Bombay Co-operative Societies Act taken care to provide that only the share or interest of a member in the capital of the society or any provident fund established under section 41 of the Act shall be exempt from attachment or sale under any decree or order of a Court. Therefore, if monies due to a member are by way of deposits made by him or otherwise and they do not answer the description mentioned in section 26 the creditor is not prevented from attaching those amounts.

A member of the Bombay Postal Co-operative Society transferred to the society his life insurance policies by way of security for sums borrowed from the society and had nominated the plaintiff as his nominee in the society. On the death of the member a decree-holder creditor of his levied attachment against the amount standing to the credit of the deceased with the society after the adjustment of amounts due to it. The plaintiff, as the nominee of the deceased in the society, after an unsuccessful intervention with a claim petition, filed a suit for a declaration that he was absolutely entitled to that amount:

Held, negativing the claim, that the creditor was entitled to attach the amount due from the society as it did not answer the description mentioned in section 26 of the Act.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 114 of 1943, preferred against the decree of the Court of the District Munsiff of Coimbatore in O. S. No. 53 of 1942.

V. S. Rangaswami Aiyangar for Appellant.

C. D. Venkataramanan for 1st Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff appeals against the decree of the lower appellate Court dismissing his suit for a declaration that he is absolutely entitled to a certain fund over which the first respondent levied attachment in execution of a money decree obtained against the assets of the second respondent's father. The amount in question is about Rs. 1,437 which stood to the credit of Ramakrishna Ayyar, the

* S. A. No. 1110 of 1944. 27th April, 1945.

second respondent's father, in the hands of a society known as the Bombay Postal Co-operative Society Limited. The deceased Ramakrishna Iyer was a member of this society. He borrowed certain monies and transferred by way of security two postal life insurance policies. After adjusting the amounts due to the Bombay Co-operative Society there was a sum of Rs. 1,437-11-0 to the credit of Ramakrishna Iyer. The husband of the first respondent obtained a decree against Ramakrishna Iyer in 1932 and levied attachment of the amount in question after the death of Ramakrishna Ayyar which took place on the 20th September, 1938. The attachment was in the year next after Ramakrishna Iyer's death. The plaintiff is the nominee of the deceased Ramakrishna Iyer in the Bombay Postal Co-operative Society.

The Society is governed by the Bombay Co-operative Societies Act (VII of 1925). Under that Act a society which has as its object the promotion of the economic interests of its members in accordance with co-operative principles of a society established with the object of facilitating the operations of such a society may be registered under the Act. The liability of the members of a society is limited in some cases and unlimited in other cases. Section 6 deals with a case where the liability of the members of a society is limited by shares. Every member who becomes a shareholder is entitled to certain rights and privileges and is under certain obligations which are laid down in the Act. Under section 27 of the Bombay Act, bye-laws are made and one of the bye-laws says that a member may nominate any one he desires as the person to whom in the event of his death he wishes the sums due to him to be paid by the Society. It would appear that there was a similar rule made under section 22 of Act II of 1912 which governed the society before the Bombay Act was passed. The plaintiff was nominated by Ramakrishna Iyer the deceased. Ramakrishna Iyer became indebted to the first respondent's husband and the latter obtained a decree against Ramakrishna Iyer in 1932. He levied attachment over this sum of Rs. 1,437-11-0 in 1939. The plaintiff intervened with a claim petition objecting to the attachment, but the claim petition was dismissed. That has led to the present suit. Both the lower Courts dismissed the suit and hence this second appeal.

The point for determination is whether the amount in question was liable to be proceeded against in execution of the money decree against Ramakrishna Iyer. Ramakrishna Iyer was a shareholder of the Bombay Postal Co-operative Society. He transferred to the Society evidently by way of security an asset of his which consisted of certain life insurance policies. This he did when he borrowed some money from the society. After satisfying the amounts due to the Society there was this sum of Rs. 1,437-11-0 due to the shareholder Ramakrishna Iyer. Ex. P-44 shows that the society does not claim any right over this fund. In that document the society stated that the sum would be paid as per section 27 (2) of the Bombay Co-operative Societies Act of 1925 to S. S. Narayanaswami Iyer, the nominee of the deceased, unless orders to the contrary were obtained from a competent Court of law. The first respondent has levied attachment and the question is whether it is a legal order.

Before we come to this question the plaintiff must show what right he has to maintain the suit. One argument advanced by the learned advocate for the appellant is that as Ramakrishna Iyer effected an absolute transfer of the insurance policies in favour of the society, Ramakrishna Iyer had no interest thereafter and that therefore a creditor of Ramakrishna Iyer has no right to proceed by way of attachment. This argument, if pressed to its logical conclusion, would lead to the result that the plaintiff has no right to maintain the suit. Only the sum that was due to Ramakrishna Iyer could be paid under section 27 (2) of the Act to his nominee and if this argument of the learned advocate for the appellant is accepted, namely, that Ramakrishna Iyer had no interest at all once his insurance policies were transferred absolutely, the plaintiff will have to be non-suited on that ground. But the real position seems to be that Ramakrishna Iyer still retained an interest in the policies and the transfer was only by way of security for a loan. As was pointed

out above Ex. P-44 shows that the sum in question was treated as the sum due to Ramakrishna Iyer. If, therefore this was a sum due to Ramakrishna Iyer, it is difficult to see how a creditor of Ramakrishna Iyer is not entitled to attach that sum. Sections 25 and 26 of the Bombay Act, which correspond to sections 20 and 21 of the Imperial Act (II of 1912) and to sections 22 and 23 of the Madras Act (VI of 1932) are important in this connection. Section 25 says that a society shall have a charge upon the share or interest in the capital and on the deposits of a member or past member and upon any dividend, bonus or profits payable to a member or past member in respect of any debt due from such member or past member to the society and may set off any sum credited or payable to a member or past member in or towards payment of any such debt. Section 26 says that subject to the provisions of section 25, the *share or interest of a member in the capital of a society or in any provident fund established under section* 41 *of the Act* shall not be liable to attachment or sale under any decree or order of a Court of justice in respect of any debt or liability incurred by such member. Reading these sections together the position is this. A shareholder may have certain shares or an interest in the capital. He may also have certain deposits. There may also be due to him dividends, bonuses or profits. Over all these sums due to the member the society has a right, *i.e*, the right to a set off or a charge in respect of monies due to it from the member. When the legislature came to make a provision against attachment at the instance of the creditor of a member, the legislature took care to say that only the share or interest of a member in the capital of the society or any provident fund established under section 41 of the Act shall be exempt from attachment or sale under any decree or order of a Court. Therefore, if monies due to the member are by way of deposits made by him or otherwise and they do not answer the description mentioned in section 26, namely :

> "the share or interest of a member in the capital of a society or in any provident fund established under section 41 of the Act,"

the creditor is not prevented from attaching those amounts. The question is whether there is any prohibition against the attachment of the sum in question which was certainly that of Ramakrishna Iyer. Supposing he pledged a jewel worth Rs. 1,000 for a debt of Rs. 200, subject to the right of the society to get the Rs. 200 with interest and any other sum that may be due to it, the balance will remain to the credit of the shareholder. It may not be a deposit but it is certainly property transferred to it by way of security. The contention advanced by the learned advocate for the appellant goes to this length that property given as security and even deposits made by a member in the society are not attachable by his creditors. I do not think that this result follows. Whatever may be the rights and obligations *inter se* between the nominee and the heirs at law, it appears to me to be clear that so far as the creditors are concerned they are not precluded from levying attachment over such funds. They do not cease to be the property of the deceased. No decision to this effect has been brought to my notice. The learned advocate for the appellant has drawn my attention to the decision of Venkataramana Rao, J., in *Thiagarajan* v. *Venkatarama Iyer*[1]. The question there related to what would be really the share capital of a fund. This decision has no bearing on this case. Now, if the appellant's contention were accepted, a member of such society has only to deposit all his earnings in such a society and make a nomination and the result would be that all his creditors will be left without any remedy and cannot proceed against the deposits made by the borrower in a fund of this kind. In the face of the express provisions of section 26 of the Act as to what is not attachable, the inference must be that the rest is attachable. Section 25 enacts that a shareholder may have certain shares or interest in the capital ; he may have certain deposits ; dividends may be due to him and, as in the case before us, a certain amount may be due to him as the balance of the proceeds of a particular asset after satisfying the debts due to the Society. Of these, only the items enumerated in section 26 are exempt from attachment.

1. (1935) 70 M.L.J. 581.

Otherwise section 26 would have been enacted saying that all sums due from the society to a shareholder are exempt from attachment. If a borrower can prevent his creditors from proceeding against his earnings by the simple device of depositing them in a society of this kind and making a nomination, it would be a novel method of cheating the creditors.

The appeal is dismissed with costs.

No leave.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Pathuri Venkata Narayana and others .. *Appellants**

v.

The Hindu Religious Endowments Board, Madras .. *Respondent.*

Madras Hindu Religious Endowments Act (II of 1927), sections 9 (11) *and* 69—Swastivachakam *and* vedaparayanam *service grant—Whether constitutes endowment—Liability to contribution.*

A grant of land given for the *vedaparayanam* or *swastivachakam* service in a temple is a personal grant subject to the performance of the named service and comes within the exception contained in the last portion of section 9 (11) of the Madras Hindu Religious Endowments Act. Consequently, the lands granted to the holder of the office is not liable to contribution under section 69 of the said Act.

Appeal against the decrees of the Court of the Subordinate Judge, Tenali, in A. S. No. 8 of 1943, preferred against the decrees of the Court of the District Munsiff, Repalle, in O. S. No. 290 of 1939, etc.

A. C. Sampath Aiyangar for Appellants.

The Advocate-General (*P. V. Rajamannar*), *K. Subba Rao* and *M. Seshachalapathi* for Respondent.

The Court delivered the following

JUDGMENT.—One common question arises in all these second appeals and that is whether certain lands which were granted to the holders of two offices of *swastivachakam* and *vedaparayanam* are liable to contribution under section 69 of the Madras Hindu Religious Endowments Act. Under that section :

"Every math or temple and every specific endowment attached to a math or temple shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per-centum of its income as the Board may determine."

And endowment is defined by section 9 (11) as meaning :

"all property belonging to, or given or endowed for the support of, maths or temples or for the performance of any service or charity connected therewith and includes the premises of maths or temples but does not include gifts of property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple."

There is an observation of Curgenven, J., in *Kotayya* v. *Yellamanda*[1], to the effect that the definition of an endowment in section 9 is wide enough to include properties which were given to the temple servants burdened with the performance of services connected with the temple. The learned Judge expressed his opinion on page 733 thus :

"An endowment includes (I am going to quote only the relevant portion) 'property given or endowed for the performance of any service connected with the temple'. Ordinarily speaking the word 'endowment,' I think, is restricted to property the title to which vests in the institution endowed. But this definition is very wide and I am not prepared to say that a service inam held by a temple servant would not fall within it."

That this is mere obiter is shown by the fact that notwithstanding this expression of opinion, the learned Judge held that as the case before him arose under section 44, which required a charge on the property and there was no charge in that case, no order could be passed under section 44. Hence it is only an expression of opinion, though it be a strong expression of opinion. In the *Hindu Religious Endowments Board, Madras* v. *Chavali Vallayya*[2], the question arose directly for decision. That

* S. As. Nos. 1418 to 1420 of 1943 and 389 to 391 of 1944. 6th December, 1944.

1. (1933) 65 M.L.J. 54 : I.L.R. 56 Mad. 731. 2. S. A. No. 443 of 1943.

was a suit for contribution and the property involved was one which the learned Judge held was an archaka service inam and not a grant to the temple itself. Nevertheless, the learned Judge, Horwill, J., held that under section 69, the property was liable to contribute. The learned Judge while referring to the definition of the expression " religious endowment " did not set out section 9 (11) in full but mentioned only this :

> "All property . . . . endowed for the support of maths or temples or for the performance of any service . . . . . connected therewith."

and then expressed a strong view in favour of his conclusion and he relied upon the opinion of Curgenven, J., in the decision already referred to in *Kotayya* v. *Yellamanda.*[1] Neither Judge referred to the last portion of the definition in section 9 (11) where it says that the endowment

> " does not include gifts of property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple."

In a case where the grant is made not to the temple but to an archaka or other servant to the temple it is personal grant to the archaka or other employee of the temple. It may be burdened with the obligation of performing the services of the archaka or the other services for the performance of which it was given to the other employees of the temple. Thus, the grant in this case given for the *vedaparayanam* service was given as a personal grant to the ancestors of the plaintiffs in O. S. No. 286 of 1939 subject to performance of the service of *vedaparayanam* or reciting the vedas in the temple. In the other case. it was similarly a personal grant subject to the performance of *swastivachakam* service. *i.e.*, reciting some prayer in the temple. These two cases seem, therefore, to come within the last portion of section 9 (11) under the heading as a personal gift to the employee of the temple, though it may be burdened with the obligation of performing certain services in the temple. There are other sections which seem to indicate the same view, but it is unnecessary to refer to them in view of a subsequent decision of Horwill, J., which was on this point not challenged in Letters Patent Appeal. This question arose again before Horwill, J., in The *Board of Commissioners of Hindu Religious Endowments, Madras* v. *Divi Seshacharyalu*[2]. There, the learned Judge went into the question at great length and came to the conclusion that the grant was to the archaka of all the 13 kuchelus of land included in those suits. He then said that all the 13 kuchelus were exempt from liability to contribute under section 69. The learned Judge has not referred to his earlier judgment, though I am told that this learned Judge's attention was drawn to the earlier judgment. However that might be, the learned Judge in this later judgment pointed out that the expression ' endowment ' as ordinarily understood implies that it must be a gift to the temple. This is what the learned Judge said after setting out section 9 (11) and section 69 :

> " So that if this may be regarded as an endowment within the meaning of section 9 (11) then it is liable for contribution, even though the property vests in the archakas. The definition does not say that to constitute an endowment, the gift must be to the temple ; but it is only by presuming that this was what the Legislature intended that the definition of an endowment can be brought into consonance with what is ordinarily understood by that word. Curgenven, J., considered this question in *Kotayya* v. *Yellamanda,*[1], but he did not have to decide it ; and so he naturally did not express a very emphatic opinion one way or the other."

Then he set out the observations of Curgenven. J.. which I have already set out. Then Horwill, J., proceeded thus :

> " I am reluctant to interpret section 9 (11) as giving a definition of ' endowment ' contrary to its accepted meaning or section 69 of the Act as making liable to the contribution persons, where a general reading of the Act seems to make liable only institutions ; I am therefore of opinion that the land is not liable to the contribution claimed by the Board."

In the case before him 13 kuchelus of land were involved. As regards 10 kuchelus, there was an argument that it was a grant to the temple itself. But as regards the 3 kuchelus, it is admitted that it was a grant direct to the archaka burdened only with the performance of service. The two second appeals went up

1. (1933) 65 M.L.J. 54 : I.L.R. 56 Mad. 731. 2. S.A. Nos. 802 and 803 of 1942.

in Letters Patent Appeals Nos. 1 and 2 of 1944; *The Board of Commissioners of Hindu Religious Endowments* v. *Divi Seshacharyalu and others.*[1] The Letters Patent Appeals were disposed of by the Chief Justice and Byers, J. The Endowments Board was the appellant in the Letters Patent Appeals. The learned Judges dealt with 10 kuchelus of land which were urged by the Board to have been an endowment to the temple itself. They referred to the inams register and statements and the other documents and came to the conclusion that those 10 kuchelus of land formed an endowment to the temple itself and not to the archakas burdened with the performance of archaka service. Then they said this :

> "It follows that, in our judgment, the Board is entitled to levy contribution in respect of ten-thirteenths of the income from the lands and that the declaration granted by the trial Court to the plaintiffs must be limited to three-thirteenths."

It is difficult to say from this judgment whether the conclusion of Horwill, J., that as regards the three-thirteenths or the three kuchelus of land which were admittedly a grant to the archaka burdened with the obligation of performing the archaka service in the temple was liable to contribute or not was ever challenged before the judges who decided the Letters Patent Appeals. The first point that the advocate for the Board should have taken was that even assuming that all the 13 kuchelus were the archaka service inams, still having regard to the earlier judgment of Horwill, J., and the observations of Curgenven, J., they were nevertheless liable to contribute. That position was negatived by Horwill, J., in the appeals that went up in Letters Patent Appeals and from what I can see from the Letters Patent Appeal judgment, this position does not seem to have been challenged, or at any rate the Judges, who decided the Letters Patent Appeals, did not differ from the conclusion of Horwill, J., as regards the three kuchelus. Therefore, it must be taken that the view of Horwill, J., is that if certain properties are archaka service inams as contrasted with an endowment to the temple itself, no contribution can be claimed from those properties ; and the view which I have expressed from a reading of the definition is that it is excluded from the expression "religious endowment". I assumed that this would be the position in *The Hindu Religious Endowments Board, Madras* v. *Vadepalli Jagannathacharyalu*[2]. There, the question was whether the endowment was entitled to levy contribution from certain properties. I held that the properties are not archaka service and that they were the endowments belonging to the deity and I considered that on that basis the Endowments Board was entitled to levy contribution. The question which arose directly for decision was that even in the absence of a temple committee, one and a half per cent contribution, which is provided for a Committee, can be levied. Following another judgment of a Bench, I held that the Endowments Board was entitled to that contribution as well. On page 261, I said this :

> "The question of declaration of the liability was also involved in the further stages of the suit, because the plaintiffs' claim that the properties were their own archaka service inams, if upheld, would have precluded the appellant Board from levying a contribution even for the future years."

There is no discussion and the decisions on the point were not brought to my notice. But that is the opinion that I expressed, *viz.*, that if they were archaka inams, the Board would be precluded from levying contribution. The question, in my opinion, is wholly concluded by the later decision of Horwill, J., which on this point has not been dissented from by the Judges in the Letters Patent Appeals and confirmed to that extent, because the Letters Patent Appeals were dismissed to that extent.

The result is that in the first batch of cases—S. A. Nos. 1418 to 1420 of 1943—the decrees of the lower appellate Court are reversed and decrees of the trial Court restored. In the next batch of cases—S. A. Nos. 389 to 391—the decrees of the two lower Courts are set aside and the decree granted in terms of prayers (*a*) and (*b*) of the plaint. The appellants are entitled to their costs in all the second appeals throughout. (Advocates' fee Rs. 25 in each case).

No leave.

B.V.V. — *Appeals allowed.*

1. L.P.As. Nos. 1 and 2 of 1944. 2. (1944) 2 M.L.J. 260.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.)

PRESENT:—LORD THANKERTON, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Rao Sobhagsingh .. *Appellant**

v.

Rao Ranjitsingh .. *Respondent.*

Civil Procedure Code (*V of* 1908), *section* 11, *Explanation IV—Defence which might and ought to have been raised in prior litigation between the parties.*

To a claim for a half share of the income from offerings made by pilgrims to an idol, the defence pleaded was that the plaintiff was entitled only to a half share in the income of one portion only of the offerings, namely, the *Shamlat khut* or joint account. In an earlier litigation between the plaintiff's father and the present defendant regarding the former's right to a share of the same offerings relating to that period, the present defence was not stated and that case proceeded on the footing that the plaintiff in that case was entitled to one-half of the whole amount subject to certain deductions to be made which were then in dispute and not material now and was ultimately dismissed as it was found on accounting that nothing was due to the plaintiff.

Held, that the defendant in the present case was excluded from maintaining the defence set up by him as the matter was *res judicata*. The plaintiff's father's title to one-half of the whole income was judicially upheld in the earlier case, and the present defence of the defendant was a matter which might and ought to have been made ground of defence in the previous suit, and was therefore to be deemed to have been a matter directly and substantially in issue in such suit, within the meaning of Explanation IV to section 11 of the Civil Procedure Code.

Sir Thomas Strangman and *S. P. Khambatta* for Appellant.

Respondent *ex parte.*

Their Lordships' Judgment was delivered by

LORD THANKERTON.—These are consolidated appeals from a judgment and two decrees of the Court of the Additional Judicial Commissioner, Central Provinces, dated 31st August, 1935, which set aside the judgment and two orders of the District Judge, Nimar, dated 2nd January, 1931, and restored the judgment and two decrees of the Subordinate Judge, Khandwa, dated 25th June, 1930. The respondent, who is plaintiff in both suits, did not appear in these appeals. The appellant was defendant in both suits, in which the plaintiff claims a half share in the income of the offerings made by pilgrims to the idol of Shree Onkarji at the time of certain annual fairs at Mandhata. The first suit, No. 32 of 1924, relates to the Kartiki fair of 1920, and the second suit No. 45 of 1925, relates to the Kartiki and Sheoratri fairs of 1923 and Baisakhi fair of 1924. The plaintiff claims in both suits a half share of the income from the entire offerings; the defendant contends in both suits that he is entitled to a half share in the income of one portion only of the offerings, namely, the *Shamlat khut* or joint account. By the judgment under appeal the Additional Judicial Commissioner has held that the defendant is excluded from maintaining that defence as the matter is *res judicata*, and their Lordships may say at once that they are of opinion that the decision of the Additional Judicial Commissioner is correct, though they will state the reasons somewhat differently. In this view, any consideration of the merits of the defence cannot arise.

There were two previous suits between the same parties which are relevant to the question of *res judicata*. The first of these was No. 46 of 1913, afterwards renumbered No. 9 of 1917, in which the present plaintiff's father was plaintiff and claimed half of the income from offerings of 91 fairs from Samvat 1940, that is 1883 A.D., to the Baisakhi fair of Samvat 1970, that is 1913 A.D. The plaintiff only had lists of the income of forty-three of the 91 fairs, which he filed. Their Lordships find it unnecessary to go through the proceedings in detail, as the present appellant's counsel admitted that the present defence was not stated and, in the opinion of their Lordships, it is clear that the case proceeded on the footing that the plaintiff was entitled to one-half of the whole income subject to the question of certain deductions to be made before division, which were the subject of dispute, and which are not now material. In his judgment dated 15th May, 1918, the Subordinate Judge held that the burden of proving the income lay on the plaintiff, that Article 62

* P. C. Appeals Nos. 47 and 48 of 1943. 29th May, 1945.

of the Limitation Schedule applied, and that the plaintiff could only claim for the period within three years previous to the suit, and was entitled to get his share of the offerings received on or after 25th October, 1910, which involved the income of nine fairs, but that the income of only four of these had been proved, and that it was absorbed by a prior deduction, thus leaving no balance due to the plaintiff. This means that the plaintiff's title to one-half of the whole income, after the proper deductions had been made, was judicially upheld, and the present defence of the defendant was a matter which might and ought to have been made ground of defence in the previous suit, and is therefore to be deemed to have been a matter directly and substantially in issue in such suit, within the meaning of explanation 4 to section 11, Civil Procedure Code. The learned District Judge declined to come to that conclusion, on the ground that an examination of the lists filed in respect of 43 fairs showed that the income recorded was confined to *Shamlati* or joint account. He therefore concluded that the claim as well as the judgment was concerned only with such income, and it was therefore unnecessary for the defendant to state his present defence. Their Lordships are unable to agree with this view, for, in their opinion, the plaintiff clearly claimed his share of the whole income, the lists filed being incomplete, and it was only because he failed to prove more than the income of four fairs that he failed to prove a balance due to him. On appeal, the Additional Judicial Commissioner held that the decision of the District Judge on *res judicata* was incorrect, and that at any rate in one of the former suits the plaintiff clearly claimed a half of the whole income, and the question whether he was entitled to a half share of the income was put in issue and decided. The learned Judge referred specially to the plaint in the second suit No. 64 of 1918, and to the judgment in that suit. This second suit was instituted by the present plaintiff's father on [illegible]th September, 1918, against the present defendant in respect of four fairs in 1913 and 1914, which had been omitted in the previous suit, but which had been the subject of a private arrangement for calculating and keeping the income of these four fairs pending the decision of the previous suit. This suit was raised under reference to the decision in the previous suit. The Subordinate Judge gave judgment on 30th September, 1919, the suit being decreed in terms of the compromise arrived at between the parties. There is no mention in the pleadings of the defence now stated by the defendant. In their Lordships' view the question of the plaintiff's title having become *res judicata* in the previous suit, this second suit was a corollary thereto for the recovery of sums not claimed in the previous suit, and the decision of the Additional Judicial Commissioner would have been more correctly based on the previous suit. Accordingly their Lordships are of opinion that the decision of the Additional Judicial Commissioner that the defendant's present defence was excluded by *res judicata* was correct, and they will humbly advise His Majesty that the consolidated appeals should be dismissed.

Solicitors for Appellant : *T. L. Wilson & Co.*

Respondent *ex parte.*

V.S. *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD PORTER, LORD GODDARD AND SIR JOHN BEAUMONT.

V. E. A. Annamalai Chettiar .. *Appellant**

v.

Valliammai Achi and another .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (5)—*Appeal against dismissal of execution application—Is an application in accordance with law to the proper Court to take a step-in-aid of execution—Appellate Court, the only Court which can execute the decree—Computation of time to be from the date of the final order of the appellate Court—Step-in-aid of execution, if can be only in a pending execution and in furtherance of it.*

An application by way of an appeal to a Court of appeal to set aside an order of the Subordinate Court raising an attachment ordered earlier, is an application according to law to take a step-in-aid

---

* P. C. Appeal No. 19 of 1944. 30th July, 1945.

of execution of the decree. It is also an application to the proper Court, for when an application for execution is dismissed by the lower Court the appeal Court is the proper and indeed the only Court which can then execute the decree.

Govinddas Rajaramdas v. *Ganpatdas Narotamdas*, (1923) I.L.R. 47 Bom. 783, overruled.

Where an appeal against an order in an execution application is dismissed a subsequent execution application made within three years of the date of the final order of the appellate Court would be in time as falling clearly within both branches of paragraph 5 of Article 182 of the Limitation Act.

[*Annamalai Chettiar* v. *Valliammai Achi*, (1943) 1 M.L.J. 95 : I.L.R. (1943) Mad. 485, reversed.]

Quære: Whether there could not be a step-in-aid of execution if there was not an application for execution then pending and whether a step-in-aid of execution must be one in furtherance of execution and not merely one seeking to remove an obstruction to possible future execution.

J. P. Eddy, K.C. and *J. M. Parikh* for Appellant.

Subba Row for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from an order of the High Court of Judicature at Madras* dated 19th August, 1942, affirming an order of the Subordinate Judge of Devakottai, dated the 10th July, 1940. The appeal raises the question whether an application for execution, No. 72 of 1940, preferred on the 25th November, 1939, for execution of a decree dated the 3rd November, 1934, is barred by the Indian Limitation Act, and that depends on the construction of Article 182 of the Act.

That Article is in the following terms:—

Description of application.	Period of Limitation.	Time from which period begins to run.
182. For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908.	Three years.	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review, or 4. .... 5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or

The application is clearly barred by paragraph 1 of Article 182 unless it can be brought within one of the later paragraphs. Paragraph 2 has no application since there was no appeal against, or affecting the validity of, the decree; nor does paragraph 3 apply since there was no application for review of judgment. Paragraph 4 is irrelevant so far as this case is concerned.

The question therefore, is whether the case falls within paragraph 5. To bring the case within that paragraph it must be shown that there was an application made in accordance with law to the proper Court, either for execution or to take some step-in-aid of execution of the decree, and if there was such an application, time runs from the date of the final order passed thereon. It is necessary, therefore, to look somewhat closely at the facts, which are not in dispute, in order to see whether the requisite application was made and finally disposed of within three years from the 25th November, 1939.

On the 3rd November, 1934, a decree was passed on a promissory note in O. S. No. 118 of 1934, by the Subordinate Judge of Devakottai decreeing in favour of the present appellant payment of a sum of Rs. 13,716-12-0, with interest and costs by the defendants who were two widows. It was ordered that the decree should be against the property of the joint family of which the husbands of the two widows had

* (1943) 1 M.L.J. 95 : I.L.R. (1943) Mad. 485.

been members, and against the assets of a maker of the promissory note in the hands of the defendant. So the decree was not executable against the private property of the widows. For the purposes of this appeal it may be taken that the respondents represent the judgment-debtors under that decree, the appellant being the judgment-creditor.

On the 14th December, 1934, the judgment-creditor presented a petition which was numbered E. P. No. 418 of 1934, under rule 11 of Order 21 of the Code of Civil Procedure, asking that the decree should be executed by the attachment of two sums of money in the hands of garnishees, alleged to be owing to the first defendant.

On the 21st January, 1935, the learned Judge made an order on this petition "rule absolute," which presumably meant that there was an order absolute for attachment of the moneys in the hands of the garnishees.

On the 11th February, 1935, the judgment-creditor made an application No. 123 of 1935 in E. P. No. 418 of 1934, asking that he might be appointed Receiver to realise the amounts in the hands of the garnishees.

On the 19th February, 1935, an application No. 175 of 1935, was made in E. P. No. 418 of 1934 by the second defendant in the suit, asking that the order of attachment of the amounts in the hands of the garnishees might be set aside, her contentions being in short, that she had not been served with the application for attachment and that the moneys attached were her personal property and therefore not subject to the decree.

On the 10th July, 1935, the learned Subordinate Judge on this application directed that there was no need to set aside the order of attachment but that the petitioner should prefer a claim petition which might be enquired into under section 47 of the Code of Civil Procedure and the matter was adjourned to the 25th July. On the same date, namely, the 10th July, 1935, the learned Judge dismissed the judgment-creditor's application, No. 123 of 1935, for his appointment as Receiver, directing that he could make an application after the second defendant's claim was disposed of.

On the 25th July, 1935, the second defendant made an application, No. 527 of 1935, in E. P. No. 418 of 1934, under section 47 of the Code praying that the attachment of the moneys in the hands of the garnishees be raised, and on the 2nd August, 1935, in view of the pendency of the last-mentioned application, application No. 175 of 1935, for the raising of the attachment was dismissed. On the 22nd October, 1936, the learned Subordinate Judge allowed the second defendant's application and raised the attachment and it is to be noticed that that order was made in E.A. No. 527 of 1935, in E. P. No. 418 of 1934, and in O. S. No. 118 of 1934. On the making of this order the execution of the decree was open ; the judgment-creditor could either accept the order and seek to execute his decree by some method other than that asked for in E. P. No. 418 of 1934, or he could appeal against the order of the Subordinate Judge. He elected to adopt the latter course and on the 3rd December, 1936, he presented a memorandum of appeal to the High Court at Madras in E. A. No. 527 of 1935 in E. P. No. 418 of 1934 and in O. S. No. 118 of 1934, asking that the order of the lower Court be set aside, and on the 27th September, 1938, this appeal was dismissed by the High Court.

On the 25th November, 1939, as already mentioned, the judgment-creditor filed execution petition No. 72 of 1940, in O. S. No. 118 of 1934, asking that the decree of the 3rd November, 1934, might be executed by attachment of certain moveable property in the hands of defendants Nos. 2 and 3. The question for determination is whether this petition is in time.

The High Court of Madras in the judgment under appeal took the view that from the 10th July, 1935, there was no execution petition or application outstanding and that the petition No. 72 of 1940, being presented more than three years after that date, was out of time. Their Lordships are unable to appreciate this view which ignores the fact that on the 10th July, 1935, an application by one of the judgment-debtors to set aside the "attachment" was pending on the records of

the Court and the further fact that on the 27th September, 1938, this application was finally disposed of by an order made by the High Court of Madras in E. P. No. 418 of 1934, which could not have been done had that petition terminated in July, 1935.

Subject to the question whether the High Court of Madras was the proper Court within Article 182 (5) their Lordships are clearly of opinion that the appellant brings his case within both branches of that paragraph. Execution Petition No. 418 of 1934 was an application made according to law for execution of the decree and it was finally disposed of by the order of the Court of Appeal made on the 27th September, 1938, which brings the case within the first branch. Further, the application to the Court of Appeal of the 3rd December, 1936, to set aside the order of the Subordinate Court raising the attachment was an application according to law to take a step-in-aid of execution of the decree. There has been some difference of opinion in the Courts in India as to what amounts to taking a step-in-aid of execution and the judgment under appeal discusses various decisions, including a decision of the High Court of Madras in *Kuppuswami Chettiar* v. *Rajagopala Aiyar*[1], in which it was held that there could not be a step-in-aid of execution if there was not an application for execution then pending, and another decision of the same Court in *Krishna Pattar* v. *Seetharama Pattar*[2], in which it was held that a step-in-aid of execution must be one in furtherance of execution and not merely one seeking to remove an obstruction to possible future execution. Their Lordships do not find it necessary to express any opinion on these questions since in the present case there was at all material times an application for execution pending, and upon any view of the matter an application to set aside an attachment is a step, in the circumstances the only step open, in aid of execution.

The only other point to be considered, and this was the point principally stressed on this appeal, is whether the High Court of Madras was the proper Court within Article 182 (5). Explanation 2 to Article 182 enacts that the proper Court means the Court whose duty it is to execute the decree or order. In *Govinddas Rajaramdas* v. *Ganpatdas Narotamdas*[3], an Appeal Bench of the Bombay High Court held that an appeal to the High Court against an order in execution was not an application according to law to the proper Court, and McLeod, C.J., stated :

> "It certainly cannot be said that an appeal to the High Court against an order in a *dharkast* is an application in accordance with law to the proper Court for execution. The High Court is not a Court whose duty it is to execute decrees passed by the lower Courts."

This view was accepted by the High Court in the judgment under appeal, but their Lordships think that it is fallacious. Under section 107 of the Code of Civil Procedure an appeal Court has the same powers, and is required to perform, as nearly as may be, the same duties as are conferred and imposed by the Code on Courts of Original Jurisdiction. Where an application for execution is dismissed by the lower Court, the appeal Court is the proper, and indeed the only Court which can then execute the decree. No doubt in practice a High Court does not itself generally execute the decrees of lower Courts ; normally it remands the case to the lower Court with directions to execute according to law on the basis of the High Court's decision ; but in a proper case the High Court would no doubt execute the decree or order itself. In their Lordships' view there can be no doubt that the High Court of Madras was the Court whose duty it was to execute the decree of 3rd November, 1934, in the manner asked for in E. P. No. 418 of 1934, if such manner were legal, after the attachment had been raised by the lower Court. The appellant, therefore, has brought himself within paragraph 5 of Article 182 and his petition No. 72 of 1940 being presented within three years of the order of the High Court finally disposing of the Execution Petition No. 418 of 1934 is in time. Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed and that the matter should be remitted to the High Court of

1. (1922) 42 M.L.J. 303 : I.L.R. 45 Mad. 466.
2. (1927) 51 M.L.J. 480 : I.L.R. 50 Mad. 49.
3. (1923) I.L.R. 47 Bom. 783.

Madras with directions that the Execution Petition No. 72 is within time and should be dealt with according to law. The respondent must pay the costs to date of Execution Petition No. 72 of 1940 including the costs of this appeal.

Solicitors for Appellant : *Lambert and White.*

Solicitors for Respondents : *Henry S. L. Polak.*

V.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Sri Chintalapati Simhadri Raju and another .. *Appellants**

v.

Akella Satyanarayana Pantulu and another .. *Respondents.*

Hindu Law—Adoption—Rule against adoption of boy between whose natural mother and the adoptive father a legal marriage is not possible—Overridden by custom in the Madras Presidency—Natural mother and adoptive father belonging to the same gotra and cousins many times removed—Adoption lawful by reason of custom.

The prohibition contained in the rule of the texts that there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state, is overridden by custom in the Madras Presidency.

Case-law reviewed.

In the circumstances of the case by reason of a custom it was held that the adoption of a boy whose natural mother in her maiden state and the person for whom the adoption was made belonged to the same gotra and were cousins many times removed, was lawful and valid.

Appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in O.S. No. 67 of 1934, dated 18th August, 1942.

V. Govindarajachari and *K. Venkatarama Raju* for Appellants.

The Advocate-General (*P. V. Rajamannar*) *Alladi Kuppuswami, P. Somasundaram* and *S. Ramamoorthy* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of an interpleader suit filed in the Court of the Subordinate Judge, Vizagapatam. The plaintiff is the receiver of the zamindari properties of one Venkata Simhadri Raju, who has throughout the suit been referred to as "Chinna Babu," the name by which he was generally known. Chinna Babu, who was a member of a Kshatriya family, died of small-pox at the village of Annamrajupeta in the Vizagapatam district, according to the first defendant at noon of the 12th March, 1934, and according to the second and third defendants on the night of the 11th March, 1934. Chinna Babu was possessed of properties worth some 30 lakhs of rupees. The first defendant claimed to be his heir as the adopted son of Chinna Babu's brother, Pedda Babu, who died on the 13th August, 1933. Pedda Babu was survived by his widow, Rajeswaramma, to whom he gave by a will an authority to adopt a son. The first defendant alleges that he was adopted by Rajeswaramma on the morning of the 11th March, 1934. If this is true, he is the heir of Chinna Babu. The second and third defendants are the paternal uncles of Chinna Babu and if the first defendant was not adopted to Pedda Babu, they are the heirs. They denied that the first defendant had been adopted and the rival claims led to the filing of this suit by the receiver of Chinna Babu's estate. The second and third defendants not only denied the factum of the adoption, but they maintained that even if there had been a giving and a taking and all the necessary formalities complied with, the adoption would be invalid because the first defendant's natural mother Chittamma was a member of the same gotra as Pedda Babu and it had been laid down by a Full Bench of this Court in *Minakshi* v. *Ramanada*[1] that under the Hindu law there can be no valid adoption unless a legal marriage is possible between the person for whom the adoption is made and the mother of the boy who is adopted, in her maiden state. While not questioning the validity of this rule, the first defendant contended that its application had been

---

* Appeal No. 324 of 1942. 24th July, 1945.

1. (1888) I.L.R. 11 Mad. 49 (F.B.).

restricted by the decision of the Privy Council in *Bhagwan Singh* v. *Bhagwan Singh*[1] and that in any event custom had avoided its application.

The learned Subordinate Judge held in favour of the first defendant on the question of the factum of adoption and also held that the rule stated in *Minakshi* v. *Ramanada*[2] had been set at nought by custom in Southern India. Consequently he held that the first defendant was the rightful heir to the estate and passed a decree in his favour. The second and third defendants have appealed.

[After discussing the facts, their Lordships proceeded.]

Agreeing with the trial Court we hold that the first defendant was adopted by Rajeswaramma to her deceased husband on the morning of the 11th March, 1934, and that all the requisite formalities were carried out.

We will now proceed to discuss and decide the question whether the adoption was valid in law. In holding that there can be no valid adoption unless a legal marriage would have been possible between the person to whom the adoption is made and the mother of the adopted boy, in her maiden state, the Full Bench in *Minakshi* v. *Ramanada*[2] clearly recognised that the rule might be overridden by custom. The case of *Bhagwan Singh* v. *Bhagwan Singh*[1] was an appeal to the Judicial Committee from a decision of a Full Bench of the Allahabad High Court. The question there was whether the alleged adoption of the appellant by one Madho Singh was void and ineffectual on the ground that the adopted boy was the son of the sister of Madho Singh's mother. Four of the five learned Judges of the Allahabad High Court were of the opinion that the adoption was not shown to be prohibited or illegal by the law of the Benares School which applied to the parties. The Judicial Committee held that no Hindu of any of the three regenerate classes, Brahman, Kshatriya and Vaisya, can adopt a daughter's son, a sister's son and a mother's sister's son and that the ancient texts condemning these adoptions were not only admonitions, but they had for so long been judicially decided to be prohibitions of law that it was not competent to a Court to treat them as still being open in this respect. The judgment of their Lordships, which was delivered by Lord Hobhouse, did not go beyond the three cases mentioned in the texts, namely, the daughter's son, the sister's son and the mother's sister's son and therefore did not decide whether the words "bearing the reflection of a son" to be found in the Dattaka Chandrika carry the rule beyond the three cases actually mentioned in the texts. Therefore the judgment of the Privy Council left untouched the judgment of this Court in *Minakshi* v. *Ramanada*[2], but their Lordships also recognised that the prohibition could be overruled by custom.

The Calcutta High Court followed *Minakshi* v. *Ramanada*[2] in *Hari Das Chatterji* v. *Manmathnath Mallick*[3], but in two cases (*Ramchandra* v. *Gopal*[4], and *Yamnava* v. *Laxman Bhimrao*[5]) the Bombay High Court has held that the prohibition applies only to the actual cases mentioned in the texts. As the Privy Council did not go to this extent in deciding *Bhagwan Singh* v. *Bhagwan Singh*[1] and as *Minakshi* v. *Ramanada*[2] is binding on us there only remains to be considered whether the Subordinate Judge was right in holding that the first defendant's adoption by Rajeswaramma is lawful by reason of a custom prevailing in Southern India among the regenerate classes.

On behalf of the first defendant 29 witnesses were examined on this question. Ten of them deposed to adoptions in the Kshatriya community of sister's sons. They spoke to five adoptions which were spread over the period from 1892 to 1926. Four witnesses spoke to adoptions of daughter's sons. The first of these cases occurred in 1850, the second in 1855, the third in 1862 and the fourth in 1932. Eleven witnesses spoke to adoptions among sagotras. Here six cases were mentioned but the evidence does not disclose, except in one case, what the relationship was between the adoptive father and the natural mother of the boy. In the one case the natural mother was the daughter of the adoptive father's paternal grand-uncle.

---

1. (1899) L.R. 26 I.A. 153 : I.L.R. 21 All. 412 (P.C.).
2. (1888) I.L.R. 11 Mad. 49 (F.B.).
3. I.L.R. (1937) 2 Cal. 265.
4. (1908) I.L.R. 32 Bom. 619.
5. (1912) I.L.R. 36 Bom. 533.

Mr. Govindarajachari had accepted the truth of the statements of the witnesses called by the first defendant to prove the various adoptions and it is noteworthy that the second and third defendants made no attempt to lead evidence in contradiction of the custom.

In *Ramarao* v. *Rajah of Pithapur*[1], an appeal from this Court, the Privy Council said that when a custom or usage, whether in regard to a tenure or a contract or a family right, is repeatedly brought to the notice of the Courts of a country, the Court may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. It becomes in the end a matter of process and pleading. Their Lordships made observations to the same effect in *Krishnamurthi Iyer* v. *Krishnamurthi Iyer*[2]. There are several decisions of this Court which lend the fullest support for custom pleaded by the first defendant.

In *Vayidinada* v. *Appu*[3], which was decided in 1885, two years before *Minakshi* v. *Ramanada*[4], was decided, a Full Bench of this Court held that in Southern India the custom which exists among Brahmans of adopting a sister's son or a daughter's son is valid. Three of the five judges who decided *Minakshi* v. *Ramanada*[4], were members of the Bench which decided *Vayidinada* v. *Appu*[3]. In *Appayya Bhattar* v. *Venghu Bhattar*[5], decided in 1903, a Division Bench of this Court said that the adoption of a brother's daughter's son, though not permitted by the texts of the Hindu Law, is valid in Southern India by reason of a general custom. In the judgment in that case it was pointed out that although *Vayidinada* v. *Appu*[3], apparently referred to the validity of the adoption of a daughter's or sister's son, yet the case actually before the Court was that of a brother's daughter's son. In *Appayya Bhattar* v. *Venghu Bhattar*[5] the question was the validity of the adoption of a brother's daughter's son. The judgment contains this passage to which we readily assent :

> "We must take it that the Court considered that if the adoption of a daughter's or a sister's son was valid, the adoption of a brother's daughter's son must be equally, or *a fortiori* valid, as the relationship in the latter case was more remote than in the former."

In *Sooratha Singa* v. *Kanaka Singa*[6], another Division Bench of this Court held that the adoption of a brother's daughter's son was valid by reason of custom which was proved to exist among the Kshatriya community settled in South Kanara and in *Viswasundara Rao* v. *Somasundara Rao*[7], it was held that the adoption of a daughter's son is valid by custom among the Brahmans of the Andhra or Telugu portion of the Madras Presidency as it is in the Southern districts.

There is here ample authority of this Court for holding that in the Madras Presidency the prohibition contained in the texts has been overridden by custom and we find ourselves in full agreement with the following observations to be found at page 542 of the ninth edition of Mullah's Hindu Law :

> "The basis of the rule being that marriage between agnates is prohibited, wherever the basis is ignored in the most prominent cases, namely, the sister's son and the daughter's son it is submitted that the rule must be regarded as destroyed by the exceptions, in all cases where the adopted boy's mother is an agnate of the adopter."

It would, in our opinion, be unjust to enforce the rule where the adoptive father and the natural mother of the boy are cousins many times removed, as here, when the prohibition is completely disregarded where there is such near relationship as in the case of the daughter's son, the sister's son and the mother's sister's son. The decision in *Vayidianada* v. *Appu*[3] shows that the custom is not in fact confined to such cases. In *Viswasundara Rao* v. *Somasundara Rao*[7], there are in fact six instances of adoption of a brother's daughter's son.

It follows that we also agree with the Subordinate Judge that the first defendant's adoption to Pedda Babu is lawful by reason of custom.

The appeal is dismissed with costs in favour of the second respondent. We fix the advocate's fee at Rs. 2,000. We certify for two counsel.

V.P.S. — *Appeal dismissed.*

---

1. (1918) 35 M.L.J. 392 : L.R. 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
2. (1927) 53 M.L.J. 57 : L.R. 54 I.A. 248 : I.L.R. 50 Mad. 508 (P.C.).
3. (1886) I.L.R. 9 Mad. 44 (F.B.).
4. (1888) I.L.R. 11 Mad. 49 (F.B.).
5. (1905) 15 M.L.J. 211.
6. (1919) I.L.R. 43 Mad. 867.
7. (1919) I.L.R. 43 Mad. 876.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay).

PRESENT :—VISCOUNT SIMON, L.C., LORD MACMILLAN, LORD SIMONDS, LORD GODDARD AND SIR MADHAVAN NAIR.

Commissioner of Income-tax, Bombay .. *Appellant**

v.

P. E. Polson .. *Respondent.*

Income-tax Act (XI of 1922 as amended by Act VII of 1939), section 25 (3)—"Discontinued"—Meaning—Object and effect of the amendment.

Before the Amending Act of 1939 came into force the words "discontinued" and "discontinuance" in section 25 of the 1922 Income-tax Act had been uniformly held not to cover a mere change of ownership but to refer only to complete cessation of the business. The object of the amendment in 1939 was to extend the relief in respect of a business which had been taxed under the 1918 Act to the case where there was not adiscontinuance but there was a succession and provision was made for that by the new sub-section (4). But as such relief can be given once only in respect of a business, the words "then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable" have been interpolated in sub-section (3). That being the object of the amendment it cannot be said that they impose upon the word "discontinued" in sub-section (3) any other than its natural and accepted meaning of complete cessation of business. It does not include the case of discontinuance of the business by a person formerly carrying it on as the result of the transfer or assignment of that business to another person who thereafter carries it on. Under the unamended Act, section 25 (3) gave relief in the event of discontinuance. The amendment introduced a qualification, not enlarging or altering the meaning of discontinuance but providing that, if there was a succession in respect of which relief was given, there should not be relief upon discontinuance. To construe this provision as meaning that "discontinuance" includes succession is doing violence to plain language.

Meyyappa v. *Commissioner of Income-tax, Madras*, (1943) 2 M.L.J. 8 : I.L.R. (1944) Mad. 166, approved.

The assessee, had from some date prior to 1922 until January 1, 1939, carried on business under the style of Polson Manufacturing Co. He had made profits and been charged to tax under the Income-tax Act, 1918. On January 1, 1939, he assigned the business to Polson, Ltd., which thereafter carried it on. The assessee contended that he was entitled to the benefit of section 25 (3) of the 1922 Income-tax Act as amended in 1939 by the amending Act and that no tax was payable in respect of his business for the calendar year 1938 liable to assessment in respect of the financial year 1939-40.

Held, that he was not entitled to the benefit of section 25 (3) and that the tax was payable by him for the period in question though in the circumstances he might have suffered a disadvantage.

Flaw in the legislative scheme of the amendments pointed out.

In re P. E. Polson, (1941) 43 Bom.L.R. 1034 reversed.

J. M. Tucker, K.C. and *S. P. Khambatta*, for the Appellant.

Roland Burrows, K.C. and *L. H. Jopling*, for Respondent.

Their Lordships' Judgment was delivered by

LORD SIMONDS.—This appeal, which is brought from a judgment of the High Court of Judicature at Bombay,† raises a difficult question of Indian income-tax law upon which different views have been expressed by the High Courts of Bombay and Madras.

The question can be briefly stated. It is whether the word "discontinued" in section 25 (3) of the Indian Income-tax Act, 1922 (hereinafter called "the 1922 Act"), as amended by the Indian Income-tax (Amendment) Act, 1939 (hereinafter called "the amending Act"), means only a complete cessation of the business or whether it also includes the case of discontinuance of the business by the person formerly carrying it on as the result of the transfer or assignment of that business to another person who thereafter carries it on. In the case under appeal the High Court at Bombay (Beaumont, C.J., and Kania, J.) has given the wider meaning to the word : in *Meyyappa* v *Commissioner of Income-tax, Madras*[1], the High Court at Madras has given it the narrower meaning

The respondent, P. E. Polson, had from some date before 1922 until January 1, 1939 carried on business in coffee, butter, flour and casein under the style of Polson

---

*P.C. Appeal No. 39 of 1944. 29th May, 1945.

† (1941) 43 Bom.L.R. 1034.

1. (1943) 2 M.L.J. 8 : I.L.R. (1944) Mad. 166.

Manufacturing Company. He had made profits and been charged to tax under the Indian Income-tax Act, 1918. On January 1, 1939, he assigned the business to Polson, Ltd., which thereafter carried it on.

Part I of the amending Act, which includes the amendments of sections 25 and 26 of the 1922 Act, came into force on April 1, 1939, by virtue of Notification No. 7 of the Central Government dated March 18, 1939.

In May, 1939, the Income-tax Officer, Companies Circle, Bombay, issued a notice to the respondent under section 22 (2) of the 1922 Act for the assessment year 1939-40, and on August 4, 1939, the respondent made a return which contained an item of Rs. 1,64,726 in respect of income from his business for the previous year, *i.e.*, the year 1938. Before any assessment was made he submitted a revised return showing "Nil" under all items. As his covering letter showed he based his return upon a claim to be entitled to the benefit of the provisions of section 25 (3) of the 1922 Act as amended by the amending Act. This claim was rejected by the Income-tax Officer who, on November, 29, 1939, passed an order under section 23 (3) of the 1922 Act assessing the respondent to tax on a total income which included the item of Rs. 1,64,726 in respect of the business. The respondent appealed to the Appellate Assistant Commissioners who by an order passed on March 30, 1940, dismissed the appeal. The respondent thereupon applied to the Commissioner of Income-tax, Bombay, Sind and Baluchistan, to review the assessment or to refer to the High Court for its decision the following questions of law :—

"1. Whether on the facts of the case your petitioner (the respondent) is entitled to the benefit of section 25 (3) of the Income-tax Act?

2. Whether in view of the provisions of the said section 25 (3) no tax is payable by your petitioner (the respondent) in respect of his income from business of Polson Manufacturing Company for the Calendar year 1938 liable to assessment in respect of the financial year 1939-40."

The Commissioner, expressing his own opinion that the respondent was not entitled to any relief under the section on June 20, 1941, duly referred the case to the High Court at Bombay. That Court, on October 1, 1941, delivered judgment answering both questions in the reference in the affirmative. It is from this judgment that the Commissioner of Income-tax appeals, contending that the respondent is not entitled to the relief claimed and that the referred questions should be answered in the negative.

It is now necessary to refer to certain provisions of the Indian Income-tax Acts upon the interpretation of which this case depends.

It must in the first place be borne in mind that under section 3 of the Indian Income-tax Act, 1922 (which in this respect differs from the English Income-tax Acts) the subject of charge is not the income of the year of assessment but the income of the previous year. This was a change introduced by the 1922 Act. Previously under the 1918 Act the subject of charge was the actual income of the year of assessment. The result of this change was that, if a business was in existence and earning profits in the year 1921 when the 1918 Act was in force and continued in existence in the year 1922 when the 1922 Act was in force, the owner would pay income-tax twice over on his 1921 profits. It was accordingly necessary in the 1922 Act to differentiate for the purpose of discontinued businesses between those which had and those which had not, been charged to tax under the 1918 Act.

Section 25 of the 1922 Act deals with assessment in the case of discontinued businesses. By sub-section (1) it provides that, where any business on which income-tax was not at any time charged under the provisions of the 1918 Act is discontinued in any year, an assessment may be made in that year on the basis of the income, profits or gains of the period between the end of the previous year and the date of such discontinuance in addition to the assessment, if any, made on the basis of the income, profits or gains of the previous year. This sub-section does not apply to the present case, but reference may be made to it as illustrating the purpose of the Act to make the number of assessments agree with the number of years during which the business has been carrried on.

Sub-section (2) of section 25 is an administrative provision. It is upon sub-section (3) that this appeal turns. Before the amending Act of 1939 came into force it was in the following terms :—

"(3) Where any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, is discontinued, no tax shall be payable in respect of the income, profits and gains of the period between the end of the previous year and the date of such discontinuance, and the assessee may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

The purpose and effect of this sub-section is clearly to give relief to a tax-payer who but for it would in the aggregate be charged with tax once in respect of every year's income and twice in respect of one year's income.

Section 26 of the 1922 Act deals by sub-section (1) with assessments where at the time of making the assessment it is found that a change has occurred in the constitution of a firm and by sub-section (2) with assessments where at the time of making the assessment it is found that there has been a succession. It is a section which distributes a tax already charged as between old and new members of a firm or between the predecessor and the successor in a business. In its original form it provides that in the case of a succession the assessment shall be made on the successor as if he had been carrying on the business throughout the previous year and had received the whole profits for that year.

Before the amending Act came into force the words "discontinued" and "discontinuance" in section 25 of the 1922 Act had been the subject of numerous decisions in the Courts of India, amongst them *Commissioner of Income-tax, Bombay* v. *Sanjana & Co., Ltd.*,[1] *Kalu Mal Shori Mal* v. *Commissioner of Income-tax, Punjab*,[2] and *Hanutram Bhuramal* v. *Commissioner of Income-tax, Bihar*,[3] and it had been uniformly decided that these words did not cover mere change of ownership but referred only to a complete cessation of the business. Their Lordships entertain no doubt of the correctness of these decisions, which appear to be in accord with the plain meaning of the section and to be in line with similar decisions upon the English Income-tax Acts. Nor has their correctness been challenged in the judgment under appeal or in the argument before their Lordships.

It has however been contended that the amendments introduced by the Amending Act impose a different interpretation upon section 25 and it is this contention that has been accepted by the High Court at Bombay.

The amendments so introduced are as follows :

Section 25 (1) and (2) are not touched. Into section 25 (3) after the word "discontinued" there are interpolated the words "then, unless there has been a succession by virtue of which the provisions of sub-section (4) have been rendered applicable." A new sub-section (4) is introduced which is in the following terms :

"(4) Where the person who was at the commencement of the Indian Income-tax (Amendment) Act, 1939 (VII of 1939), carrying on any business, profession or vocation on which tax was at any time charged under the provisions of the Indian Income-tax Act, 1918, (VII of 1918), is succeeded in such capacity by another person, the change not being merely a change in the constitution of a partnership, no tax shall be payable by the first mentioned person in respect of the income, profits and gains of the period between the end of the previous year and the date of such succession, and such person may further claim that the income, profits and gains of the previous year shall be deemed to have been the income, profits and gains of the said period. Where any such claim is made, an assessment shall be made on the basis of the income, profits and gains of the said period, and, if an amount of tax has already been paid in respect of the income, profits and gains of the previous year exceeding the amount payable on the basis of such assessment, a refund shall be given of the difference."

A new sub-section (5) is also introduced, but it is not relevant to the present question. Consequential amendments are made in sub-section (6).

1. (1925) I.L.R. 50 Bom. 87.
2. (1929) 3 I.T.C. 341.
3. (1938) 6 I.T.R. 290.

Section 26 has also been substantially amended, but it is convenient to pause and examine the amendments to section 25 before turning to section 26.

It must first be noted that the new sub-section (4) of section 25 has no application to the respondent. On January 1, 1939, he ceased to be the owner of the business. Therefore he was not carrying it on "at the commencement of" the amending Act. *Prima facie* these words mean the date when the Act comes into force, *i.e.* on April 1, 1939. It is at any rate clear that they cannot mean any earlier date.

The scheme of the amendment may then be observed. It is clear enough. Under the unamended Act relief was given in respect of a business, which had been taxed under the 1918 Act, only when it was discontinued. It was thought desirable to extend this relief to the case where there was not a discontinuance but there was a succession. Thus upon a transfer the transferor or predecessor would get the same relief as he would have got if the business had been discontinued. This provision is made by the new sub-section (4). But such relief can be given once only in respect of a business. Therefore, when the owner, who transfers, has got relief under sub-section (4), it would not be right for the transferee to get relief under sub-section (3) if and when the business is discontinued. For these reasons the words that have been cited are interpolated in sub-section (3).

This being the clear purpose and effect of the amendments, their Lordships see no reason for thinking that they impose upon the word "discontinued" in sub-section (3) any other than its natural meaning which had indeed received unanimous judicial sanction in the Courts of India, and they would further observe that it would only be a compelling context which could by virtue of an amendment require a different interpretation of words so construed. But in fact the amending provisions so far from raising any doubt as to the meaning ascribed to "discontinued" appear to enforce that meaning. Under the unamended Act, section 25 (3) gave relief in the event of discontinuance; the amendment introduced a qualification, not enlarging or altering the meaning of discontinuance but providing that, if there was a succession in respect of which relief was given, there should not be relief upon discontinuance. To construe this provision as meaning that "discontinuance" includes succession appears to do violence to plain language.

It is, however, to section 26 and its amendments that much argument was directed. Sections 25 and 26 no doubt form part of a single scheme and their interaction must not be ignored. But section 26 is primarily directed not to the circumstances in which relief from taxation is given but to the apportionment of tax where relief is not given. Its application to the case under appeal is not in doubt. It is sub-section (2) of section 26 as amended by the Amending Act which applies, and, inasmuch as at the time of making the assessment, *i.e.*, in November, 1939, the respondent had been succeeded in carrying on the business by the company, each of them became assessable in respect of his actual share, if any, of the income, profits and gains of the previous year. If the sub-section had not been amended, the company as the successor would have been assessable as if it had been carrying on the business throughout the previous year and had received the whole of the profits of that year. The language of section 26 both in its original and in its amended form appears to be unambiguous and there is nothing in it that can throw any doubt upon the interpretation which must be given to section 25. It is true that in the result the respondent may have suffered a disadvantage. When he transferred his business to the company on January 1, 1939, he presumably did so upon the footing of the existing law, including the unamended section 26, so that he could count on the company as successor being assessed to the profits of the business of the previous year. It probably did not matter to him therefore that he would get no relief under section 25 (3). But by the time the assessment was made in November, 1939, the law had been changed and as the result of the amended sub-section (2) of section 26 he became liable to an assessment not contemplated by him or his transferee. The relief that is given upon

discontinuance might ultimately accrue to the company but that, he justly says, is not his relief. It is possible that there is here a flaw in the legislative scheme which requires remedy. It would appear *prima facie* at least that in such a case the burden of so-called double taxation falls upon the tax-payer notwithstanding the plain intention of the section to avert it. But this is a consideration which cannot be allowed to influence the clear interpretation of the section, though it may well afford grounds for amending legislation.

In the result, their Lordships agree with the reasoning and decision of Leach, C.J., and Patanjali Sastri, J., in *Meyyappa* v. *Commissioner of Income-tax, Madras*[1], rather than with that of the High Court of Bombay.

The appeal must be allowed and the two questions referred to the High Court by the Commissioner of Income-tax must be answered in the negative. The respondent must pay the appellant's costs of this appeal and of the reference. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respondent : *Barrow, Rogers and Neville.*

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Labhai *alias* Sheik Abdul Khadir and another .. *Petitioners**

Criminal Procedure Code (V of 1898), section 196-A—Prosecution under section 120-B of the Penal Code read with rule 90-B of the Defence of India Rules (1939)—Previous sanction as required by section 196-A, Criminal Procedure Code not necessary—Effect of sub-rule (3) of rule 90-B of the Defence of India Rules.

The petitioners were prosecuted under section 120-B of the Penal Code read with rule 90-B of the Defence of India Rules, for conspiracy to export gold from British India. They contended that the offence was a non-cognizable one and that if it was not a non-cognizable one, it was an offence in respect of which the punishment was only a fine of Rs. 1,000 and that hence the prosecution could not be started without a sanction as required by section 196-A of the Criminal Procedure Code.

Held, that the offence was a cognizable one in respect of which the offender was liable to receive a sentence of five years' rigorous imprisonment and consequently, section 196-A of the Code of Criminal Procedure did not necessitate a previous sanction.

The effect of the new sub-rule (3) of rule 90-B of the Defence of India Rules is to give those who contravened this rule, the benefit of being dealt with under the Sea Customs Act, 1878. But at the same time the amendment retained the punishment for such offence in cases where the Collector thought the benefits of that Act ought not to be given to a particular offender or particular offence; and in this case the punishment of rigorous imprisonment of five years on conviction is retained. It cannot therefore be said that by this amendment the sentence awardable for the offence had been reduced ; nor that the offender ceased to be liable to be sentenced to five years' rigorous imprisonment.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Devakottai, dated 24th May, 1945, in C. C. No. 77 of 1945.

V. V. Srinivasa Aiyangar, T. R. Srinivasan, K. Bashyam and *R. Desikan* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioners are accused 7 and 8 in C. C. No. 77 of 1945 on the file of the Additional First Class Magistrate of Devakottai. They, along with others, were prosecuted under section 120-B, Penal Code read with rule 90-B of the Defence of India Rules, for conspiracy to export gold from British India. The petitioners contended that the prosecution cannot be started without a sanction as required by section 196-A of the Code of Criminal Procedure. It runs thus :

"No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120-B of the Indian Penal Code, * * * (2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognziable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Provincial

---

1. (1943) 2 M.L.J. 8: I.L.R. (1944) Mad 166.

*Crl. R.C. No. 434 of 1945. 3rd August, 1945.
(Crl. R. P. No. 398 of 1945).

Government or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Provincial Government, has, by order in writing, consented to the initiation of the proceedings."

The question for consideration is whether the offence with which the petitioners have been charged is an offence in respect of which sanction has to be obtained as required by section 196-A. The petitioners' contention is that it is a non-cognizable offence, and if it is not a non-cognizable but a cognizable one, it is an offence in respect of which the punishment is only a fine of Rs. 1,000. This contention is not accepted by the learned Public Prosecutor. His case is that it is not a non-cognizable offence but a case of cognizable offence in respect of which the accused are liable to be punished with a sentence of five years' rigorous imprisonment and that consequently no previous sanction is necessary. The offence in this case is, as already stated above, that of exporting gold from British India. Rule 90-B of the Defence of India Rules, as it originally stood, prevented the export of coins and currency notes. In March 1941, the word "gold" was added, thereby prohibiting the export of gold from British India. At the time when this was added, the punishment provided for the contravention of this rule was provided in the same rule and it was five years' rigorous imprisonment. Subsequently, sub-rules 3 to 7 were replaced by one sub-rule which is the present sub-rule (3). As it stands now, it runs thus :

"The restrictions imposed by sub-rule (2) on the export of money or gold shall be deemed to have been imposed under section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly; provided that where in respect of any contravention of this rule the Customs Collector is of opinion that the penalties provided by the said Act are inadequate, he may make a complaint to a Magistrate having jurisdiction ; and the accused person shall, upon conviction, be punishable with imprisonment for a term which may extend to five years or with fine or with both, and the money or gold in respect of which the offence has been committed shall be confiscated by the Central Government and delivered to the Customs Collector for disposal."

All that the amendment enabled was to give those who contravened this rule the benefit of being dealt with under the Sea Customs Act, 1878. It enabled the persons who contravened the rule to compound ; it enabled them to be made subject to a penalty instead of being prosecuted, and the penalty was to be levied by the Customs Department official, and the limit of the penalty has been fixed at three times the value of the articles or Rs. 1,000. But at the same time the Amendment retained the punishment for such offences in cases where the Collector thought that the benefits of the Sea Customs Act ought not to be given to a particular offender or a particular offence ; and in this case the punishment of rigorous imprisonment of five years on conviction was retained. It cannot therefore be said that by this amendment the sentence awardable for the offence had been reduced ; nor can it be said that the person who committed this offence ceased to be liable to be sentenced to five years' rigorous imprisonment. If that be so, the offence is one in respect of which the offender makes himself liable to imprisonment for five years. In all cases in which a maximum punishment is imposed, the offender is liable to the maximum punishment, though that punishment may not be given and the discretion is in the Magistrate or Judge who is to award the sentence. Similarly whether a man is to be prosecuted under this section of the Sea Customs Act is in the discretion of the Customs Collector. But that does not make it any the less an offence liable to be punished with five years' rigorous imprisonment. In this view, the offence is a cognizable one in respect of which the offender is liable to receive a sentence of five years' rigorous imprisonment. Consequently, section 196-A of the Code of Criminal Procedure does not necessitate a previous sanction.

It is also argued for the petitioners that under rule 128 of the Defence of India Rules only certain offences are picked out in respect of which it is stated that a police officer may arrest without a warrant. That rule had to be made because all those offences in respect of which that rule was made were non-cognizable offences in respect of which the offender cannot be arrested by the police without a warrant. It cannot be taken therefore as exhaustive of all offences punishable under the Defence of India Rules in respect of which a police officer may arrest without a warrant. The petition fails and is dismissed.

V.S. ——— *Petition dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE RAJAMANNAR.

Vedlapatla Suryanarayana .. *Appellant**

v.

The Province of Madras, represented by the Collector of West Godavari .. *Respondent.*

Land Acquisition Act (I of 1894), section 6 (1), proviso and (3)—Declaration under section 6 (1) final and cannot be questioned in a Court of law—Contribution by Government of only one anna to the compensation awarded—Sufficient compliance with the provisions of the proviso to section 6 (1).

A declaration under section 6 (1) of the Land Acquisition Act is final and it is not open to the Court to inquire and decide whether the land was really required for a public purpose. Sub-section (3) of section 6 makes it quite clear that such a declaration cannot be questioned in a Court of law. A suit would no doubt lie, if the Provincial Government directed the acquisition in fraud of its powers. But in the absence of any such charge against the Government its action in directing the acquisition cannot be challenged in a Court of law.

It is sufficient compliance with the provisions of the proviso to section 6 (1) if any part of the compensation is paid out of public funds. One anna is a part of the compensation and though a small part is nevertheless a part.

Senja Naicken v. *Secretary of State*, (1926) 51 M.L.J. 849 : I.L.R. 50 Mad. 308, approved.

Ponnaia v. *Secretary of State for India*, (1926) 51 M.L.J. 338, overruled on the second point.

Appeals against the decree of the Court of the Subordinate Judge, Narasapur, in A. S. Nos. 93 and 96 of 1943, respectively preferred against the decree of the Court of the District Munsiff, Ellore, in O. S. No. 171 of 1936.

D. Munikanniah for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant in these appeals is a ryot cultivating ryotwari land in the village of Kovvali which is in the West Godavari district. In 1935 a small part of his holding, to be exact five cents of an acre, was acquired by the Provincial Government for the purpose of the construction of a water channel which was required for the irrigation of three holdings of ryotwari land cultivated by other persons in the same village. The compensation awarded was Rs. 77-10-0. The appeals arise out of a suit which the appellant filed in the Court of the District Munsiff of Ellore for a declaration that the acquisition was illegal on the ground that the land was not required for a public purpose. It was further stated that as the Government had only contributed one anna to the compensation awarded the proviso to section 6 (1) of the Land Acquisition Act had not been complied with. The District Munsiff dismissed the suit. He held that it was not open to the plaintiff to go behind the declaration issued under section 6 (1) of the Land Acquisition Act and that the proviso to section 6 (1) had not been infringed but he directed that the parties should bear their own costs. On appeal the Subordinate Judge of Narasapur agreed with the District Munsiff that the suit should be dismissed, but disagreed with him with regard to the order for costs. The Subordinate Judge held that as the Provincial Government had successfully defended the suit it was entitled to costs. S. A. No. 1161 of 1944 is from the decree dismissing the suit and S. A. No. 1162 of 1944 is from the Subordinate Judge's order with regard to costs. The appeals have been placed before a Full Bench for decision as there is a conflict of authority on the effect of the proviso to section 6 (1).

Before dealing with the conflict it is necessary to decide whether a declaration under section 6 (1) of the Land Acquisition Act is final or whether it is open to the Court to inquire and decide whether the land was really required for a public purpose. Section 5-A gives a person the right to object to a proposed acquisition. Any objection preferred must be inquired into by the Collector, who is required to submit

* S. As. Nos. 1161 and 1162 of 1944. 30th July, 1945.

the case for the decision of the Provincial Government. The section states that the decision of the Provincial Government on the objection shall be final. In this case the appellant did object and his objection was heard by the Collector who in accordance with section 5-A submitted the record of the proceedings to the Provincial Government. The Provincial Government's decision was that the acquisition should proceed.

By an order dated the 7th April, 1936, under section 6, the Provincial Government declared that the land in suit was needed for a public purpose and appointed the Revenue Divisional Officer, Ellore, to perform the functions of a Collector under the Act and directed him to take order for its acquisition. Sub-section (3) of section 6 states that the declaration shall be conclusive evidence that the land is needed for a public purpose or for a company as the case may be; and, after making the declaration, the Provincial Government may acquire the land in the manner provided by the Act. Sub-section (3) makes it quite clear that the declaration of the Provincial Government cannot be questioned in a Court of law. Of course, if the Provincial Government in fraud of its powers directed land to be acquired a suit would no doubt lie; but where there is no charge against the Provincial Government that it has acted in fraud of its powers, its action in directing the acquisition cannot be challenged in a Court of law. In answer to a direct question put by the Court, the learned Counsel for the appellant very properly said that it could not be said that the Provincial Government had acted in fraud of its powers.

We may mention that in *Wijeyasekara* v. *Festing*[1], the Privy Council held that where the Governor of Ceylon under the Ceylon Ordinance dealing with land acquisition directed the Government-agent to take orders for the acquisition of the specified land, it was not open to the owner to contend that the land was not required for a public purpose. The Ceylon Ordinance did not embody provisions similar to those embodied in section 5-A (2) and section 6 (3) of the Indian Land Acquisition Act, and therefore there is even less room for argument here. The appellant's suit clearly did not lie on the footing that the land was not required for a public purpose. The declaration by the Government settled that question.

We will turn now to the argument based on the fact that the Provincial Government only paid one anna of the compensation and the balance was paid by the cultivators of the three holdings whose lands were to be irrigated by the channel. The proviso to section 6 (1) reads as follows:

"Provided that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority."

In *Ponnaia* v. *Secretary of State for India*[2], Spencer, and Ramesam, JJ., held that where the Government had only contributed one anna towards the compensation, the land acquisition proceedings were illegal and void because this meant a mere evasion of the requirement that the compensation was to be paid wholly or partly out of public revenues. In coming to this decision the learned Judges relied on observations made in *Chatterton* v. *Cave*[3], which had reference to the interpretation of the words "or part thereof" occurring in the Dramatic Copyright Act, 3 and 4, William IV, C. 15, where it was said that part was not necessarily the same as particle. Although they set aside the acquisition in *Ponnaia* v. *Secretary of State for India*,[2] the learned Judges recognised that a declaration by Government under section 6 (1) was final and therefore could not be challenged in a Court of law.

The judgment of Spencer and Ramesam, JJ., was strongly criticised by Odgers and Madhavan Nair, JJ., in *Senja Naicken* v. *Secretary of State*,[4] which was heard in the same year. Odgers and Madhavan Nair, JJ., disagreed entirely with the decision in *Ponnaia* v. *Secretary of State for India*,[2] and held that payment out of public funds of one anna was sufficient compliance with the provisions of the proviso to section 6 (1). Odgers, J., doubted whether the remarks in *Chatterton* v. *Cave*[3],

1. (1919) A.C. 646.
2. (1926) 51 M.L.J. 338.
3. (1878) 3 A.C. 483.
4. (1926) 51 M.L.J. 849: I.L.R. 50 Mad. 308.

dealing as they did with the question of copyright could have any application when the question was of the interpretation of section 6 of the Land Acquisition Act. We are in entire agreement with this criticism. The two cases have nothing in common.

In interpreting the proviso we can only have regard to the words used and in our judgment it is sufficient compliance with the proviso if any part of the compensation is paid out of public funds. One anna is a part of the compensation. It is true it is a small part, but it is nevertheless a part. We consider that the learned Judges who decided *Senga Naicken* v. *Secretary of State*[1] took the correct view. Consequently we overrule the judgment in *Ponnaiya* v. *Secretary of State for India*[2] so far as it relates to this question. This means the dismissal of S. A. No. 1161 of 1944 with costs.

We also dismiss S. A. No. 1162 of 1944 with costs. The Provincial Government won in the District Munsiff's Court and it won in the Subordinate Judge's Court and therefore was entitled to costs in both the Courts.

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Angammal .. *Appellant**

v.

V. K. M. Muhammad Sulaiman Lebbai and another .. *Respondents.*

Civil Procedure Code (V of 1908, as amended), Order 34, rules 7 (2) and 8—Usufructuary mortgage—Preliminary decree for redemption—Failure of mortgagor to deposit amount in time—Final decree not passed—Amount paid subsequently after three years—Validity.

A preliminary decree for redemption of a usufructuary mortgage was passed on 15th October, 1935, and the time fixed for payment was 15th January, 1936. The plaintiff who was the mortgagor did not deposit the amount by the date fixed, nor did she ask for extension of time under Order 34, rule 7 (2) of the Civil Procedure Code. She deposited the amount towards the end of 1942 and then applied under Order 34, rule 8 of the Code asking the Court to pass a final decree with a direction to the defendant to deliver the mortgaged property to her.

Held, that the petitioner was entitled to the remedy asked for by her in the petition. The outer limit beyond which payment under rule 8, sub-rule (1) cannot be made, is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under rule 8 (3) of Order 34 of the Code.

Held, further, that the mortgagor was not bound to take out an application within three years of the time for payment fixed by the preliminary decree and that she was entitled to deposit the amount so long as the final decree was not passed.

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in A. S. No. 104 of 1943, preferred against the decree of the Court of the District Munsiff, Srivaikuntam, in I. A. No. 93 of 1943, in O. S. No. 413 of 1930.

P. N. Appuswami Aiyar for Appellant.

S. V. Rama Aiyangar for Respondents.

The Court delivered the following

JUDGMENT.—A preliminary decree for redemption of a usufructuary mortgage was passed on the 15th October, 1935, and the time fixed for payment was 15th January, 1936. The plaintiff did not deposit the amount on or before that date and did not ask for extension of the time under Order 34, rule 7 (2). She deposited the amount towards the end of 1942 and filed I. A. No. 93 of 1943 on the 2nd February, 1943, under Order 34, rule 8 of the Code of Civil Procedure asking the Court to pass a final decree with a direction to the defendant to deliver the mortgaged property to her. The trial Court dismissed the petition and on appeal the Subordinate Judge confirmed the decree of the trial Court and hence this second appeal.

The appellant urges that her case is covered by the terms of Order 34, rule 8 and that it enables her to pay into Court the amounts due from her as fixed under

1. (1926) 51 M.L.J. 849 : I.L.R. 50 Mad. 308. 2. (1926) 51 M.L.J. 338.

* S. A. No. 1455 of 1944. 26th April, 1945.

rule 7 (1) of Order 34, at any time before a final decree debarring the plaintiff from all right to redeem the mortgaged property is passed. Order 34, rule 7 provides that:

"In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant . . . .

(b) declaring the amount so due at that date; and

(c) directing (i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken . . . the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property . . . and shall also, if necessary, put the plaintiff in possession of the property; and

(ii) that if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interests, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property."

Sub-rule (2) of rule 7 provides that the Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before the passing of the final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest. Rule 8, sub-rule (1) provides:

"Where, before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of a sale held in pursuance of a final decree passed under sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts due from him under sub-rule (1) of rule 7, the Court shall, on application made by the plaintiff in this behalf, pass a final decree . . . . ."

The respondent urges that in the case of a preliminary decree for redemption of a usufructuary mortgage, the only right that the plaintiff may have after the time fixed for payment has expired, is the remedy provided under rule 7, sub-rule (2) and that he cannot exercise the right given under rule 8, sub-rule (1). Rule 8 (1) gives the right to a mortgagor to pay the amounts due from him under sub-rule (1) of rule 7 at any time before a final decree debarring the plaintiff from all right to redeem the mortgaged property has been passed or before the confirmation of the sale held in pursuance of a final decree for sale passed under rule 8 (3) (b). *Prima facie* even in the case of a usufructuary mortgage, the mortgagor would seem to have a right of paying under rule 8 (1) the amount fixed under rule 7 (1) and ask for consequential reliefs. The argument is that rule 8 (1) fixes as the outer limit the passing of a final decree debarring the plaintiff from all right of redemption or the confirmation of a sale and that as neither is possible in the case of a usufructuary mortgage, rule 8 (1) does not at all apply to usufructuary mortgages. It is said that possibly the mortgagor has a remedy under rule 7 (2), that for getting relief under that rule an application by the mortgagor is necessary, that the application must be filed within three years from the date when the right to apply accrues under Article 181 of the Second Schedule of the Limitation Act and that therefore no relief at all can be given to the mortgagor more than three years after the date fixed for payment under rule 7, sub-rule (1). I do not agree with the view that in the case of a usufructuary mortgage the plaintiff has no right of payment under rule 8, sub-rule (1) for the reason that a usufructuary mortgagee-defendant has no right of applying for a final decree debarring the plaintiff from all right to redeem the mortgaged property or of bringing the property to sale. The outer limit beyond which payment under rule 8, sub-rule (1) cannot be made is the passing of a final decree debarring the plaintiff from all right to redeem the mortgaged property or the confirmation of a sale held under rule 8 (3). In a case of mortgage by conditional sale or other cases where a foreclosure decree of this kind is possible, this

limit will be reached when the mortgagee applies and gets a decree debarring the mortgagor of all right of redemption. In a case where a sale is possible, the outer limit is reached when the sale held in pursuance of rule 8, sub-rule (3) (*b*) is confirmed. This does not, in my opinion, mean that in the case of a usufructuary mortgage, no payment can be made except under rule 7 (2) for the reason that neither foreclosure nor sale is possible. If for the reason that rule 8 (1) provides that payment may be made before a final foreclosure order is passed or a sale confirmed the rule is not to apply to usufructuary mortgages, the same reason should lead to the conclusion that rule 7 (2) also should not apply to usufructuary mortgages. Rule 7 (2) says this:

"The Court may . . . . at any time before the passing of a final decree for foreclosure or sale as the case may be, extend the time fixed for payment of the amount found or declared due under sub-rule (1) . . . . ."

This rule also fixes as the outer limit, the passing of a final decree for foreclosure or sale. Neither is possible in the case of a usufructuary mortgage and so the result must be that no extension of time is possible in cases of usufructuary mortgages. If it is conceded that rule 7 (2) applies and that the mortgagor may have the time extended under that rule even in a case of a preliminary decree for redemption of a usufructuary mortgage, I fail to see how a different construction is possible in the case of rule 8 (1). The only reasonable construction is to say that in the case of a usufructuary mortgage, there is no outer limit before which action must be sought.

The next argument is that an application is necessary and that under Article 181 of the Second Schedule to the Limitation Act an application must be filed within three years from the expiry of the time fixed in the preliminary decree for payment that being the time when the right to apply accrued. I am unable to accept this argument. Under rule 7 (2) the limit is expressly stated to be the "passing of a final decree for foreclosure or sale." That refers obviously to a final decree for foreclosure or sale at the instance of the defendant-mortgagee. The defendant-mortgagee has three years from the date fixed for payment to apply for a final decree for foreclosure or sale. Suppose the mortgagee-defendant applies just a day before the expiry of three years from the date fixed for payment for a final decree for foreclosure or sale, and it takes some months for effecting service on the mortgagors, the passing of the final decree will necessarily be beyond the three years' period. Yet rule (2) expressly provides that at any time before the final decree for foreclosure or sale is passed the Court may on good cause shown extend the time fixed. This means that action under rule 7 (2) may be invoked by the mortgagor beyond three years from the date of payment.

I cannot therefore accept the argument that for action under rule 7 (2), an application by the mortgagor is necessary which according to the respondent has to be filed within three years from the date fixed for payment. This perhaps is the reason why the Legislature has advisedly not provided that action under rule 7 (2) should be invoked by an application. Wherever an application is necessary, the Code has expressly stated so. It is unnecessary to refer to the various provisions of the Code which expressly provide for applications to be filed. After payment under rule 8 (1) the mortgagor has to apply for a final decree or an order in case a final decree has been passed for the reliefs provided in rule 8 (1) (*b*) and (*c*). For this application the starting point is the payment by the mortgagor. It will be noticed that after payment the mortgagor must file an application for a final decree or order. No such provision exists for payment under rule 8 (1).

The same reasoning applies to payment under rule 8 (1) of Order 34, in cases admittedly covered by that rule, *i.e.*, in cases where a final decree for foreclosure or sale is possible. In such cases reading Order 34, rule 8 (3), with Article 181 of the Second Schedule of the Limitation Act, the defendant-mortgagee may within three years from the date fixed for payment apply for a final decree for foreclosure or sale. If the application is made on the eve of the expiry of the three years' period, the passing of the final decree for foreclosure will go beyond the period, and a sale in execution of a final decree for sale may take years after the expiry

of the three years' period. Yet the mortgagor has by the express language, a right to pay before the passing of the final decree for foreclosure or before the confirmation of the sale. This is the reason why for payment under rule 8 (1) no application is provided as necessary.

It is then argued that if no application is necessary and there is no time limit of three years from the date fixed for payment, a mortgagor may wait for years and years and then invoke action. This argument applies equally to a case where final decrees for foreclosure or sale are possible and the mortgagee does not apply for foreclosure or sale. The argument overlooks the fact that in cases where a final decree for foreclosure or sale is possible, the defendant-mortgagee may put an and to the mortgagor's power of applying at any time beyond three years by making the necessary application for a final decree for foreclosure or sale. If the defendant-mortgagee in such a case does not choose to apply for a final decree, there is no reason why there should be any limit of time for action by the mortgagor either under rule 7 (2) or under rule 8 (1) at least in cases where a final decree for foreclosure or sale is possible.

Then it is said that a usufructuary mortgagee-defendant has not even the right of applying for a final decree and of so forcing action on the part of the mortgagor. This again does not appear to be right. A preliminary decree does not put an end to a suit whether the preliminary decree is one for partition as in *Lachmi Narain Marwari* v. *Malmukund Marwari*[1] or for accounts or for sale or foreclosure or for redemption. The suit is considered to be pending until it is terminated. In cases where a final decree is possible, the suit terminates where a final decree is passed. In a case of a preliminary decree for redemption of a usufructuary mortgage, if the mortgagor pays the amount, a final decree has to be passed. If he does not apply, it would seem that the mortgagee-defendant may ask the Court to dismiss the suit. That such a course is possible is seen from the decision of the Allahabad High Court in *Behari* v. *Ramanand*[2]. There in a suit for redemption of a usufructuary mortgage, the Court passed a decree under Order 34, rule 7 of the Civil Procedure Code fixing a date for payment and the decree provided that on failure of payment by the plaintiff the suit shall stand dismissed. Plaintiff failed to pay the amount within the time fixed and afterwards applied for extension of time and the Court granted it. On deposit of the amount a final decree was passed directing delivery of possession. The matter came up in second appeal before the High Court. The High Court pointed out that a decree under Order 34, rule 7, sub-rule (1) was only a preliminary decree and that the suit should be put an end to by a subsequent order passed after the time fixed had elapsed. The learned Judges said this :

> "We have no doubt whatever that the Court did not intend to pass a final decree concluding the suit. The decree says in so many words that it is a preliminary decree under Order 34, rule 7, Civil Procedure Code, and in further adding that 'on failure their suit shall stand dismissed with costs' we do not think the Court meant that without any further order of the Court the suit should stand automatically dismissed. All it meant was that, on failure of the mortgagor to deposit the mortgage money within the time allowed for redemption, it would be open to the mortgagee to apply for dismissal of the suit, and that the order of dismissal, if passed, would be embodied in a final decree which would conclude the suit. In this view, it was open to the Court of first instance to grant an extension of time to the mortgagor . . . . . ."

There is no doubt no provision to that effect in the Code but it is possible to postulate a power in Court to put an end to the action.

Even if we take it that in the case of a decree for redemption of a usufructuary mortgage, the defendant has no right of asking the suit to be dismissed for non-payment by the mortgagor of the amount decreed the suit will have to be considered to be pending and the mortgagor will have the right of paying the amount at any time. As I pointed out above, in the case of a mortgage by conditional sale, if after a preliminary decree for redemption, the mortgagor does not pay and the mortgagee does not ask for final decree for foreclosure within the time available to him, the result may be that the suit should be considered to be pending as it has not been properly terminated. In that case the mortgagor would have the right

1. (1924) 47 M.L.J. 441 : L.R. 51 I.A. 321 : I.L.R. 4 Pat. 61 (P.C.). 2. A.I.R. 1933 All. 157.

of payment at any time under rule 8 (1). Similarly in cases where the defendant-mortgagee can ask for final decree for sale. I do not see therefore any substance in the argument based on the possibility of payment at any time. This may be no doubt very inconvenient. But the Legislature has not provided that the suit may be terminated if neither the mortgagor nor the mortgagee obtained a final decree. The Privy Council has ruled that in a case of a preliminary decree for partition the suit cannot afterwards be dismissed for non-prosecution and must be kept pending. The same result may follow in cases of redemption suits where after a preliminary decree, no action is taken by the parties. It may well be that as the rights of the parties are declared by the preliminary decree, the suits cannot be dismissed for non-prosecution.

Whatever that may be, so long as the suit is pending, the mortgagor has the right expressly given to him under rule 7 (2) and under rule 8 (1) of Order 34, Civil Procedure Code. The whole scheme of Order 34, Civil Procedure Code, is to give the mortgagor an opportunity of getting the time fixed in the preliminary decree for payment of the amount extended. In cases of suits by the mortgagees for foreclosure or sale, provision is made for such extension at the instance of the mortgagor on his showing good cause. Rule 2 (2) provides for such extension in a suit for foreclosure. Rule 4 (2) provides for similar power in a suit for sale. Without the necessity of showing good cause, the mortgagor is also given by rule 3 of paying the amount decreed at any time before a final decree debarring the defendant from all right to redeem the mortgaged property is passed. Similarly in suits for sale the Code goes further and rule 5 provides that such payment may be made at any time before confirmation of a sale held in pursuance of a final decree for sale.

Likewise in suits for redemption filed by the mortgagors we have rule 7 (2) corresponding to rule 2 (2) and rule 4 (2) enabling the plaintiff-mortgagor of getting an extension of time on showing good cause at any time before a decree for foreclosure or sale is passed. Again rule 8 (1) provides just as rules 3 and 5 that before a final decree debarring the mortgagor of all right to redeem the property is passed or before the confirmation of a sale held in pursuance of a final decree for sale passed under rule 8 (3) (*b*), the mortgagor may make the payment and that without the necessity of showing good cause. There can be no doubt that these double opportunities given by the Legislature were available to mortgagors suing for redemption of a usufructuary mortgage also prior to 1st April, 1930. Under the rules of Order 34, as they then stood, in a suit for redemption of a usufructuary mortgage, the defendant-mortgagee could, in case of non-payment by the plaintiff-mortgagor, ask for a final decree for sale. Why this was omitted it is difficult to see. Anyway while omitting the right of a usufructuary mortgagee to ask for a final decree for sale, the Legislature left rules 7 (2) and 8 (1) as they stood. There is no intelligible or apparent reason why, only in the case of redemption of a usufructuary mortgage, the mortgagor should not have the right of getting an extension even by showing good cause under rule 7 (2) or without showing any cause under rule 8 (1). Under the Code as it stood prior to 1st April, 1930, both rule 7 (2) and rule 8 (1) applied to cases of usufructuary mortgagees because a final decree for sale was expressly granted to a usufructuary mortgagee-defendant in a suit for redemption of such a mortgage. If the contention of the respondent is accepted, it would follow that after the time fixed for payment has elapsed, the mortgagor has in such a case no remedy at all and must resort to the doubtful and certainly very expensive remedy of a fresh suit for redemption. I do not think that such a result was intended and Courts should, if it is possible to do so, construe both rule 7 (2) and rule 8 (1) as applicable to suits for redemption of usufructuary mortgages as well. The trouble is caused by piecemeal legislation and want of due care to see that the necessary amendments in other parts of the Code are also made.

In the result, the decrees of the lower Courts are reversed and a final decree under Order 34, rule 8 (1) will be drawn up granting the reliefs (*a*), (*b*), (*c*) of the said rule. The appellant will have her costs throughout.

B.V.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

G. F. F. Foulkes by his agent T. V. Muthuswami Iyer .. *Appellant**

v.

Salem Municipal Council, Salem. .. *Respondent.*

Madras District Municipalities Act (V of 1920), sections 3 (17), 81 (4) (b) and 86—Levy of property tax on owner of agricultural land—Distinction between landholder having interest in land and person cultivating land—Levy on owner justified.

The idea underlying the District Municipalities Act with reference to the levy of property tax on agricultural land is that a person who owns property is liable to assessment of property-tax; and it does not seem to be necessary that he should own the entire interest in the agricultural land. The Act itself makes a distinction between the interest of the landholder and the interest of the person who cultivates the land, be he a cultivating tenant or a tenant with permanent rights of occupancy.

Where an assessee of property-tax in respect of agricultural lands contended that as the lands belonging to him were ryoti in the possession of occupancy ryots, he was not the "owner" of those lands.

Held, that the assessee was an 'owner', as defined in section 3 (17) of the Act, as he receives the profits of the property and he cannot escape assessment.

Appeal against the decree of the Court of the Subordinate Judge, Salem, dated 1st March, 1944, and passed in A. S. No. 71 of 1943 preferred against the decree of the Court of the District Munsiff, Salem, in O. S. No. 247 of 1941.

M. Sundaram for Appellant.

K. Subba Rao for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal preferred by the plaintiff raises a simple question. He contends that, in respect of agricultural lands for which he has been assessed to property tax by the Municipal Council, Salem, he is not the owner, as the lands are ryoti in the possession of occupancy ryots. He has to be assessed not on the kudiwaram but only on the basis of his melwaram right. Section 81 (4) (*b*) of the Madras District Municipalities Act contemplates an assessment on the land-holder and the tenants. Whether the ryots can be described as tenants when they have occupancy rights is a question with which we are not now concerned. The plaintiff is certainly a landholder within the meaning of the Madras Estates Land Act. Granting that the definition of the Estates Land Act will not apply, we have to find out whether he comes within the description of "owner" on whom the assessment is to be levied under section 86 of the Act. "Owner" is defined in section 3 (17) as including a person who receives or is entitled to receive the rent or the profits of the property. The plaintiff is such a person as he receives rent—at any rate he receives the profits of the property. Whether a person in the position of the appellant can be assessed to property-tax on the basis of his melwaram right was considered in *Chairman, Municipal Council, Anakapalle* v. *Narayana Gajapati Raju Bahadur Garu*[1], where the question arose whether he could be assessed on the basis of the kudiwaram interest also; and it was held that he could not be as the kudiwaram belonged not to him but to the ryots. The idea underlying the Act is that a person who owns property is liable to assessment of property-tax; and it does not seem to be necessary that he should own the entire interest in agricultural land. The Act itself makes a distinction between the interest of the landholder and the interest of the person who cultivates the land, be he a cultivating tenant or a tenant with permanent rights of occupancy.

The second appeal is hence dismissed with costs. No leave.

K.C. —————— *Appeal dismissed.*

---

* S. A. No. 1632 of 1944. 30th July, 1945.

1. (1939) 2 M.L.J. 304.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Kandia Goundan .. *Appellant**

v.

Palani Goundan .. *Respondent.*

Torts—Liability of a person changing the course of a channel for damage caused to a neighbouring owner—Change in the course of the channel not the primary or the proximate cause of the damage—Damage due to heavy rainfall inevitable even if there had been no change.

A person changed the course of a channel, but damage caused to the neighbouring owner was due to an extraordinarily heavy rainfall. In a suit by the latter to recover damages for the loss caused,

Held, that in view of the circumstances that (*a*) the change was not the primary or the proximate cause of the damage, (*b*) the damage must have been caused by the overflow of water from other sides of the land as well, and (*c*) the damage would still have occurred even if the channel which existed before had been allowed to continue uninterfered with, the person changing the course of the channel was not liable for damage done to the neighbouring owner.

Corporation of Greenock v. *Caledonian Railway Co.*, (1917) A.C. 556 and *Fletcher* v. *Smith*, (1877) 2 A.C. 781, referred to.

Appeal against the decree of the District Court, Coimbatore, dated 29th December, 1943, and made in C. A. No. 195 of 1943, preferred against the decree of the Court of the District Munsiff, Coimbatore, in O. S. No. 1308 of 1941.

C. D. Venkataramanan for Appellant.

C. S. Swaminathan for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal involves a very interesting question of the liability of a person who changes the course of a channel for damages to a neighbouring owner whose lands were flooded by excessive rainfall.

The appellant is the owner of some lands on which he had raised chrysanthemum (Javanthi) crop. The defendant-respondent is the owner of the land situated at some distance to the east of the plaintiff's land and his land is on a higher level than the plaintiff's land. The defendant's land, survey field 345/2 was originally a kuttai or pond which used to receive the water drawn from the adjacent lands. It was assigned by the Government for cultivation to one Abdul Salam Saheb by Ex. D-2 in the year 1932. He made some improvements on the land by raising the level of the pond and the very purpose of the darkhast grant was to permit the grantee to raise crops on the kuttai which could only be done by filling up the pond. There was a surplus channel flowing northward from this pond leading to a pallam or a deep hollow. Abdul Salam put up a bund across the head of the channel and opened a new channel to the east of it diverting water along the new water-course running northwards into the same pallam or deep hollow.

In 1937 Abdul Salam sold the land to the defendant-respondent by Ex. D-1. The respondent got the patta transferred to his name and made some further improvements by still further raising the level of the pond and by blocking up the bund at the head of the old northward surplus drainage channel. On the 10th June, 1941, there was an unusually heavy rain, the like of which had not been seen for several years past. The plaintiff's land was flooded and considerable damage was caused to the Chamanthi flower crop. The present suit was filed for recovering damages for the loss of that crop. Both the lower Courts have dismissed the plaintiff's suit though on different grounds and hence this second appeal.

It is common ground that the plaintiff's land is so situated that water from three sides flows into it. There is a pond in one of the lands belonging to the plaintiff himself and when owing to a heavy rainfall that pond becomes full, the overflow finds its way into the plaintiff's lower garden. Not only that, water from some other directions also flows into the plaintiff's land. The appellate Judge has summed

* S. A. No. 1352 of 1944. 20th March, 1945.

up this part of the case fairly accurately in paragraph 10 (E) of his judgment. He says :

"It appears from the evidence of plaintiff's witnesses themselves that the plaintiff's land was a converging focus for flow of water from not only the defendant's kuttai but also from other sources and other directions. The Revenue Inspector P. W. 1 says that the water would have flowed into the plaintiff's land from the south and west from the Itteri which is to West of S. F. No. 110. P. W. 3 also says that the water flows from the Itteri on the south on to the plaintiff's land. Plaintiff himself as P. W. 2 says that the land of Arusami Goundan, north and south of defendant's land is higher in level (than defendant's land) and that the water from those lands also flows into the plaintiff's lands."

It has been found by the lower appellate Court that there was unprecedented rainfall on the day in question and that the defendant's act in shifting the course of the channel slightly to the east was not the proximate or primary cause of the damage caused to the plaintiff's crop. Mr. V. Ramaswami and Mr. Venkataramanan who both addressed arguments on behalf of the appellant raised very interesting questions of the liability of a person who changes the course of a channel or stream and took me through a number of decisions of the English Courts which deal with such questions. In Coulson and Forbes (Law of Waters) 5th edition, the position is well summed up at page 143 thus :

"The principles of law regulating the duties and liabilities of the owners of land with regard to the escape and overflow of water, and the rights they have of protecting their land from such overflow, have been discussed of late in a series of important cases, and seem now to be settled on a satisfactory basis. The general principle regulating the liabilities of landowners, with regard to the escape and overflow of water, seems to be as follows : Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief thereby accrues to his neighbour, he will not be liable for damages ; but where for his own convenience he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he acts without wilfulness or negligence, he will be liable for all direct and proximate damages, unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm, which amounts to *vis major*, or the act of God, in the sense that it is practically, if not physically, impossible to resist it."

The present case is not one in which the defendant brought upon his land water which would not naturally have come upon it. Cases where the defendant constructs a reservoir and collects water in it stand on quite a different footing and different considerations apply in those cases. Sir Frederick Pollock in his treatise on the "Law of Torts", 14th edition, deals with this subject in chapter 12 under the heading of, Duties of Ensuring Safety.

The decision strongly relied upon for the appellant is that of the House of Lords in the *Corporation of Greenock* v. *Caledonian Railway Co.*[1] The law was laid down there in these terms :

"It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damages results from the deficiency of the sub t ute which he has provided for the natural channel he will be liable . . . . . Owing to a rainfall of extraordinary violence, the stream overflowed at the pond, and, as the result of the operations of the authority a great volume of water which would otherwise have been carried by the stream in its natural course without mischief poured down a public street into the town and damaged the property of two railway companies."

There a Municipal authority laid out a park and in so doing altered the natural course of a stream and constructed a concrete paddling pond and diverted the water of the natural stream into the pond. Thereafter water was let back into the natural stream at a further point. Owing to extraordinary rainfall, water overflowed at the pond and a great volume of water *which would otherwise have been carried off by the stream in its natural course without mischief* poured down into the town and damaged the property of the railway companies. It was held by the House of Lords that the extraordinary rainfall was not a "*damnum fatale*" which absolved the authority from responsibility, and that they were liable in damages to the railway companies. One fact which was found in that case is very important and that is that the stream in its natural course would have carried away the water due to the extraordinary rainfall on the day in question if its course had not been altered in

1. (1917) A.C. 556.

the way in which it was altered by the defendant. At page 567 Finlay, L.C., said this :

"I agree with the Lord Ordinary in thinking that in point of fact the flood coming down Inverkip Road caused by the diversion into this road of the water, which, but for the Corporation's works, would have found its way to the sea by the open channel, substantially contributed to the disaster."

Then he considered the law on the subject and said this at page 571 :

"These authorities justify the view of the law propounded by Professor Rankine in his work on the Law of Land Ownership in Scotland, 4th edition, page 376: "The sound view seems to be that even in the case of an unprecedented disaster the person who constructs an opus manufactum on the course of a stream or diverts its flow will be liable in damages provided the injured proprietor can show (1) that the opus has not been fortified by prescription; and (2) that but for it the phenomena would have passed him scatheless."...

Then he dealt with the defence that the disaster was really caused by an act of God and that the injury was in the nature of "*damnum fatale*." After referring to the definition given of the expression *damnum fatale* in an earlier case by Lord Westbury as a thing which does not involve any legal liability, a circumstance which no human foresight can provide against and of which human prudence is not bound to recognise the possibility and which when it occurs is a calamity which does not involve the obligation of paying for the consequences that may result from it, the Lord Chancellor proceeded thus :

"In my opinion, the appellants have entirely failed to establish any defence on this ground. It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time. It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable. Such damage is not in the nature of damnum fatale, but is the direct result of the obstruction of a natural watercourse by the defenders' works followed by heavy rain."

Nichols v. *Marsland*[1] was then referred to and was distinguished as based really on the finding of the jury there arrived at that the flood was so great that it could not reasonably have been anticipated and that that was in substance a finding that the escape of water was owing to an act of God.

Lord Shaw put the matter thus at page 578 :

"The case, on the facts, is, so far as the operations of the corporation were concerned, of a simple character. That body made an operation in the alveus of a natural stream. This stream, added to in volume here and there by little tributaries, was wont to flow to the sea in a wide natural channel. It is admitted that on the occasion of the heavy rainstorm in question, apart from the check, accumulation, and distortion caused by the appellants' operations, the natural channel would have accommodated the rainstorm and passed its waters safely to the sea."

He laid down the law thus :

"A person making an operation for collecting and damming up the water of a stream must so work as to make proprietors or occupants on a lower *level as secure against injury as they would have been had nature not been interfered with.* And this is so although the water accumulated suddenly, or the fall was extraordinary or even un-precedented in quantity. These are the general propositions of the law." (The Italics are mine.)

Then he referred to the fact that in Scotland wherefrom the case came, extraordinary rainfalls were not uncommon and cannot be called a *damnum fatale*.

Lord Wrenbury stated thus :

"My Lords, the other matter, upon which I will add a word is as to the law. Numerous cases have been cited, beginning in England with *Rylands* v. *Fletcher*[2], and in Scotland with *Samuel* v. *Edinburgh and Glasgow Railway Co.*[3] v. and *Kerr* v. *Earl of Orkney*[4]. But in none of these was the question one as to liability for the consequences resulting from works in alveo fluminis whereby the natural alveus was filled up and the flow of water under the force of gravity thrown into a new channel at a new and higher level. The effect of the corporation's works was that, except in so far as their culvert sufficed to take and took water coming from the westward, the Inverkip Road was substituted for the V of the valley, and became the channel by which all that water had to be drained away. In such a case the corporation is responsible, I conceive, for resultant damage howsoever arising. The responsibility to provide a substituted channel is not limited to providing a channel sufficient to meet all demands which might reasonably be anticipated, or even all demands (in excess of the ordinary) short of the act of God. The corporation must provide a substituted channel which will be equally efficient happen what will. Assuming an act of God, such as a flood, wholly unprecedented, the damage in

1. (1875) L.R. 10 Ex. 255.
2. (1868) L.R. 3 H.L. 330.
3. 13 D. 312.
4. 20 D. 298.

such a case results not from the act of God, but from the act of man in that he failed to provide (as there was before) a channel sufficient to meet the contingency of the act of God. *But for the act of man there would have been no damage from the act of God.*" (The italics are mine.)

From the various passages set out above it is clear that the decision of this case rested really upon the finding of fact that the stream in its natural course would have carried away the water caused by the extraordinary rainfall if the course of the stream had not been altered. In fact as laid down in the passage extracted from Rankine's work by the Lord Chancellor, before the plaintiff can succeed in a suit for damages one of the things which he has to prove is that but for the defendant's act, the phenomena would have passed him scathless, that is to say that but for the interference caused by the defendant, the phenomena, the extraordinary rainfall would have passed him scathless.

Only one other decision need be noticed and that is *Fletcher* v. *Smith*[1]. Lord Penzance stated that three possible views might be taken as to the liability in law of a person who interferes with a water course. We find this at page 787:

"At the threshold of the inquiry, as to the defendants' liability to the plaintiff lies the question—what obligations did the defendants incur when they diverted the natural water course? It is not on the one hand a question in this case, whether the defendants were required thus to divert the watercourse before they pursued their mining operations in its neighbourhood; and on the other hand, it is not made a ground of complaint against them that they did divert it. But, in diverting water what were their obligations?

Was it enough to make the new and artificial watercourse as efficient, but no more so, than the old and natural one, so that whatever defects, incapacity, or otherwise, the old one had, might, without responsibility, be re-produced in the new one?

Or, secondly, were they bound (as they, for their own convenience, were making a new and artificial water course) to construct it in such a manner that it would be capable of conveying off the water that might flow into it from all such floods and rainfalls as might reasonably be anticipated to happen in that locality?

Or, thirdly, were they bound to make provisions for any such quantities of water as might possibly be discharged into it from any mere rainfall, however heavy, however unusual, and however contrary to all previous experience?

Having said this, Lord Penzance said that he was inclined to think that the second proposition defines the true measure of the defendants' obligations, but that he desired to express no positive opinion to that effect, because whatever test was applied it was found the defendants were bound to fail. On page 789 he said this:

"It is clear therefore, I think, that the jury considered the new channel not as efficient as the old one would have been. And although it seems to have been proved as a matter of measurement that the cubical capacity of the new channel surpassed that of the old, it must be borne in mind that the bends and curves in the new channel, which did not exist in the old one, may have had the two-fold effect of impeding the rapid discharge of a great body of water, and of creating by a great accumulation of water an unusual strain upon the banks, at the points where these bends occurred; causing the overflow of the water and the gradual destruction of the banks themselves. The jurors, several of whom appear to have viewed the spot, may well therefore have been justified in coming to a conclusion against the sufficiency of the new watercourse as compared with the old, not withstanding the evidence as to its cubical capacity upon which the defendants' counsel so strongly relied."

These cases do not, in my opinion, afford any help for the extreme contention put forward by the appellant's learned Counsel that once a watercourse is interfered with and a new channel substituted for the old one, a defendant is bound to ensure against all risk irrespective of the question whether but for the defendant's interference with the old channel, the plaintiff would or would not have suffered damage by the rainfall in question. In the present case, the findings of the District Judge which I have set out show unmistakably that the defendant's action was not the primary or the proximate cause of the damage suffered by the plaintiff. It is also in evidence that there were crops on some lands situated between the defendant's land and the plaintiff's land and that those crops did not suffer. This makes it clear that the water which flowed from the defendant's land by itself did not cause the damage. The damage must have been caused by the overflow of water from other sides as well and the existence of a small pond which would have got filled up very soon after the rainfall commenced would not have really prevented the damage. Further even if the channel which existed before had been

1. (1877) 2 A.C. 781.

allowed to continue uninterfered with, it is equally clear that the damage would still have occurred and that the water that fell that day would not have been drained off by that old channel.

Thus there are two difficulties in the way of the plaintiff succeeding. First, it has not been established that the old channel was sufficient to satisfy the requirements of law as laid down by the later decision of the House of Lords in *Corporation of Greenock* v. *The Caledonian Railway Co.*;[1] that but for the interference, the phenomena, *i.e.*, the extraordinary rainfall would have passed the plaintiff scathless and the second difficulty is that the overflow from the defendant's land did not cause the damage and that really the damage might well have been caused and was in all probability caused by the overflow of water from two other directions.

It is contended that the lower appellate Court did not view the case from this standpoint and has not arrived at the conclusions of fact which would be enough to non-suit the appellant. Evidently the decisions now brought to my notice were not placed before the District Judge and his judgment cannot be assailed for the simple reason that he has not answered the questions in the form in which it is stated in the two decisions referred to above. But the effect of the findings is really against the appellant and therefore there is no reason shown for sending the case back for fresh findings.

The second appeal is dismissed with costs.

V.R.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE BELL.

Madiga Chinna Obigadu *alias* Chinna Madigodu .. *Prisoner (Accussed)**

Criminal Procedure Code (V of 1898), section 102—Apprehension for murder—Circumstances very clear—Entry of police into house of the accused where he had bolted himself in—No duty publicly to search themselves or other respectable persons before such entry.

Where a man was recently apprehended under very clear circumstances for murder it is not surprising that the constable should at once go in and see what were the contents of his house into which the man had bolted himself in. Section 102, Criminal Procedure Code relates only to formal searches under search warrants issued under sections 96 or 98. In an emergency of this sort when the police are not going in for the purpose of a search for any specified object but for a general investigation there is no provision in the Code which imposes on them the duty of publicly searching respectable citizens or themselves before entry. Whether as a matter of convention these things may be done in order to remove any cause for subsequent criticism is another matter.

Trial referred by the Court of Session of the Kurnool Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 6 of the Calendar for 1945 on 14th April, 1945, and appeal by the said Prisoner.

G. Gopalaswami for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Mockett, J—The accused in Sessions case No. 6 of 1945, on the file of the Court of Session of Kurnool Division was convicted and sentenced to death by the learned Sessions Judge for the murder of one Kottapu Narsi Reddi.

[His Lordship after discussing the evidence, held]

Consequently the conviction and sentence will be confirmed and the appeal dismissed.

We observe that the learned Judge when dealing with the evidence of the constable in paragraph 8-E of his Judgment says :

"It has been elicited in his cross-examination that he did not meticulously observe all the provisions of house searches in this case and that he did not search himself or the panchayatdars before going in."

---

1. (1917) A.C. 556.
* R. T. No. 88 of 1945.
(Crl. App. No. 309 of 1945.) 18th July, 1945.

That observation is founded on an answer given in cross-examination by the constable :

"I did not observe the precautions laid down in the Criminal Procedure Code for the search of the house. I did not search myself or the three other persons before we went into the house."

Neither learned counsel before us are able to tell us clearly to what provisions of the Code this question was directed and Mr. Ethiraj can only suggest that it must refer to section 102, sub-section (3). Section 102 of course relates to search warrants issued under section 96, or 98, that is to say, formal searches. We are not aware, in an emergency of this sort when the police are not going in for the purpose of a search for any specified object but for a general investigation, there is any provision of the Code which imposes on them the duty of searching respectable citizens or themselves before the public. Whether as a matter of convention these things may be done in order to remove any cause for subsequent criticism is another matter. But it would seem the learned Judge was misled by the question of counsel and the answer of the witness in supposing that the constable had neglected some actual provision of the Code. In the circumstances of this case it would not be very surprising that with a man recently apprehended under very clear circumstances for murder the constable should at once go in and see what were the contents of his house.

V.P.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Bachimanchi Venkata Kotayya Sastri and another .. *Appellants**

v.

The Province of Madras represented by the Collector of Kistna .. *Respondent.*

Inam—Channel passing through inam village—Reservation of right in favour of Government—Burden of proof—Lands along channel being dry—Inference as to right of inamdar.

Where a channel which was thirty-five miles in total length first flowed through a number of Government villages, then flowed for one mile of its course through an inam village and finally again passed through Government villages, and the inamdar who was charged to penal assessment for taking water on to his lands sued for a declaration that the levy was illegal.

Held, that the circumstances of the case were not such as to imply a reservation of the bed of the channel in favour of the Government and that the presumption was that the channel also was granted along with the whole inam village. If the Government relied on a reservation of the right in the channel it is for them to allege and prove the same. Even if the lands granted are stated to be dry lands, that does not mean that the bed of the channel in so far as it flows through the village, was not included in the grant.

Secretary of State for India v. Vidya Varada Thirtha Swamigal, (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 44 of 1942, preferred against the decree of the Court of the District Munsiff of Bezwada in O. S. No. 431 of 1938.

Ch. Raghava Rao for Appellants.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit brought by the plaintiffs-appellants for a declaration that the levy of penal assessment by the local Government-respondent is illegal. We are in this case concerned with two Survey Numbers 49 and 52 in the village of Chennurivaripalem, which is a hamlet of Krishnapuram. The two survey numbers in question are portions of Kannigala Madugu, a channel which passes through the village of Chennurivaripalem. The trial Court held in favour of the respondent on all the points and dismissed the suit. On appeal the Subordinate Judge has in paragraph 4 of his judgment pointed out various circumstances which, he says, would go to show that really the channel was part of the village of Chennurivaripalem. Having expressed that opinion, the appellate Judge

* S. A. No. 1533 of 1944. 16th April, 1945.

considers in paragraph 5 of his judgment what he considered is the law on the subject. He is of opinion that because the channel in question passes on and serves other Government villages lower down, it must in law be taken that the plaintiffs do not own the channel in so far as it lies within their village unless they prove that the channels were expressly included in the grant of the village. He states that as the whole channel is 30 miles in length and only one mile of its course lies in the suit village, it must be taken that the portion of the channel which is inside the village does not pass to them unless we have an express grant to that effect. In support of this view the Subordinate Judge has referred to certain decisions. Having regard to the decision of the Judicial Committee in the *Secretary of State for India* v. *Vidya Varada Thirtha Swamigal*,[1] I think the position is now clear that in such cases it is upon the Government to prove a reservation in its favour either by express reservation or by necessary implication. In the above case, a channel known as the N. K. Channel took its rise in Government property passed through Government lands, then entered the village of Vagaikulam, of which the respondents' predecessors were the grantees, and after serving the lands in the village directly and through subsidiary channels that branched off from it, the N. K. Channel passed out of the Vagaikulam village and entered Government villages and served those villages. One of the questions raised was whether the channel itself did or did not pass to the grantee. The trial Court held that the channel passed to the grantee under the inam grant. On this and other grounds the trial Court granted a decree to the inamdar. On appeal no opinion was expressed on the question whether the channel passed to the grantee. But on other grounds the High Court confirmed the decision of the trial Court. A further appeal was taken by the Secretary of State for India to the Judicial Committee. A number of questions were raised before the Judicial Committee which are all summarised on pages 900, 901. The third argument runs thus :

"that in any event having regard to the importance of the N. K. channel and the subsidiary channels in the irrigation system which the Government had set up and was working, an exception of them must be read by implication into any grant of the village as a whole."

This question is dealt with on page 915. They first repelled the claim that the subsidiary channels also must be taken to have been reserved to the Government. They observed thus :

"The subsidiary channels do in some cases carry water which serves to irrigate the lands of other villages so as to give them *prima facie* at least some right as lower riparian proprietors. Even so, however, their Lordships think it quite impossible to imply any reservation of the beds or banks of these subsidiary channels, having regard to their number and distribution throughout the village and to the tanks within the village which are connected with them. So to treat them would alter fundamentally the character and value of the grant. It was pointed out in the *Urlam case*,[2] that if any part of the water carried by the channels was to be specially safeguarded in the interest of some other Government villages it would be enough to imply a reservation of water rights; and that a reservation of the channels would raise questions as to the liability of Government for their upkeep and possibly for their management."

Then dealing with the case of N. K. Channel, they said this :

"There is more to be said for implying in favour of Government a reservation of the N. K. Channel itself."

The grant itself was not forthcoming and it was pointed out by the Judicial Committee that the evidence in the case was not enough to enable their Lordships to disturb the finding of the trial Court that the Channel passed to the grantee. They say this :

"From certain remarks made in the judgment of Varadachariar, J., in a previous case between the present parties, *Secretary of State* v. *Narayana Aiyar*,[3] a few more facts may be gathered, *e.g.*, 'after flowing through a number of ayan villages this channel at its tenth mile enters the Vagaikulam village and after flowing through that village for three quarters of a mile it enters the Government village of Mannarkoil and finally enters into certain ayan tanks.' But at the moment, their Lordships have not even the assistance of accurate or sufficiently detailed maps of this channel or proper evidence in explanation of them by a surveyor or engineer with knowledge of the locality. The ownership of this channel has been disputed between the Government and the math for a number of years and

1. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
2. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 : I.L.R. 40 Mad. 886 (P.C.).
3. (1937) 2 M.L.J. 178.

the question has cropped up and narrowly escaped decision more than once—always it would seem in connection with some small money claim thus coming before the High Court on second appeal as in this case. It was very carefully considered by Varadachariar, J., in the highly instructive judgment above-mentioned. The trial Court in the present case has held that the N. K. Channel belongs to the inamdar and this has not been reversed on appeal. Their Lordships have some hesitation in the circumstances in touching that finding but as they have arrived at the conclusion that a decision of this question is not necessary to the disposal of this appeal, the matter may still be left open."

There, as in this case, the N. K. Channel first flowed through a number of Government villages, then it entered the inam village, the course of the channel inside the inam village was less than a mile, and after flowing through the Vagaikulam village, the N. K. Chaneel flowed into Government villages and finally emptied itself into certain ayan tanks belonging to the Government. The Judicial Committee did not consider that these considerations were enough to infer a reservation in favour of the Government even in a case where the grant was not forthcoming. In the present case the lower appellate Court has considered that the fact that the channel in question is of 35 miles in length, that only one mile of its course lies in the suit village and that the channel flows into other Government villages, is enough to imply a reservation to the Govermnent. This view cannot be supported. The Court must now proceed upon the footing that the facts that the channel rises in a Government village, that after flowing through Government villages it enters the inam village, that after leaving the inam village it flows into other Government villages and that the length of the channel inside the inam village is very small compared with the entire length of the channel are not circumstances which would be enough to imply a reservation in favour of the Government. It is not for the inamdar to show that the channel was also included in his village; the presumption is that the channel also is granted along with the whole village. Tanks, channels all do pass to the grantee of the entire village. If the Government sets up that a particular channel by reason of certain special circumstances was reserved, it is for the Government to allege and prove it and the one fact which is relied upon by the Government is not enough. In the case before the Judicial Committee, apparently there were no other facts to determine the question. Here we have the facts found in paragraph 4 of the judgment of the lower appellate Court. The lower appellate Court will have to re-assess the evidence throwing the onus on the Government and find whether in spite of the facts set out in paragraph 4 of its judgment the Government-respondent has proved that the bed of the channel, in so far as it flows through the village in question, has been reserved, *i.e.*, excepted from the grant. The fact that the lands granted were all dry is of no consequence. That, again, must be left out of consideration. Even if the lands are dry, that does not mean that the bed of the channel, in so far as it flows through the village, has not been included in the grant. As the Judicial Committee points out, it may be that certain rights in the water may be presumed to have been reserved in favour of the owners of the lands situated lower down, but

"if any part of the water carried by the channels was to be specially safeguarded in the interest of some other Government village, *it would be enough to imply a reservation of water rights; and that a reservation of the channels would raise questions as to the liability of Government for their upkeep and possibly for their management.*" (The italics are mine.)

These considerations have to be borne in mind before arriving at a decision on this question.

There is another question raised by the learned Government Pleader who appears for the respondent, namely, the right arising out of certain resumption proceedings. The village was held in two shares, one of which belonged to one Pattabhiramayya. The half share of Pattabhiramayya was resumed by the Government. There is a question as to what exactly was resumed. The plaintiffs say that what was resumed was only Pattabhiramayya's interest in the cultivated lands of the village and not his interest in the porombokes. There is evidence in support of it. The Government has not clearly stated in the written statement that they resumed the porombokes or the bed of the channel in question. In paragraph 5 of the written statement it is put thus :

"This defendant has become owner of a half of the suit inam villages by resumption proceedings duly carried out. S. Nos. 48, 50, and 51 adjoin the suit encroachments in S. Nos. 49 and 52. S. Nos. 48, 50 and 51 are held under ryotwari tenure through the defendant, and the plaintiffs' suit as laid is not maintainable."

There is no plea here that the channel itself which is separately demarcated was also resumed. In fact, Ex. 30, which is the New A register shows that the channel has not been resumed. The channel is given various survey numbers during its course through the suit village. 49 is one such number given to it; 51/4 is another; 52 is yet another. I find as against all these numbers there is no remark that it is Government property, for which the expression used regarding lands which were admittedly resumed is 'ayan'. As against all the lands which were admittedly resumed by the Government, there is in column 4 the expression 'ayan,' and in the remarks column, it is said that it is a resumed inam. As against the survey numbers which are assigned to the channel these remarks do not appear; in column 5 it is said to be poromboke and in remarks column, the name of the channel Kannigalamadugu is alone given. With respect to the lands that are not resumed and which belong solely to the plaintiffs, the remark is 'inam' in column 5. That remark is absent in connection with Nos. 49, 51/4 and 52. Therefore, the omission of the expression either of inam or of ayan as against these survey numbers and the expression that it is Poromboke channel indicates that the Government has not resumed it.

The learned Government Pleader then says that the survey numbers resumed by the Government, particularly Nos. 48, 50, and 51 come up to the water edge, that the Government is the owner of the lands on both sides of the channel at this particular point and that therefore the Government is the owner of the whole of the bed of the channel at the particular point with which we are concerned. But this plea has not been clearly raised in the written statement or in the trial Court. There is no plea that the survey numbers, 48, 50 and 51 come up to the water edge. In very many cases, while demarcating the channel, the bunds of the channel are also included in it. Very often, some portions of the land adjoining the bund proper are also included in the channel while demarcating them. It is a special case which ought to be pleaded and proved, namely, that the lands of the Government Nos. 48, 50 and 51 come up to the water edge and that therefore they are entitled by that fact alone to the bed and banks of the channel being the owners of lands on either side. In the absence of more definite plea and having regard to the entries in the register, Ex. XXX, I do not think that it is open to the Government to raise this case.

The decision of the lower appellate Court is reversed and the appeal is remanded for disposal according to law in the light of the observations contained in this judgment. Costs of this second appeal will abide and be provided for in the revised judgment of the lower appellate Court.

B.V.V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AIYAR.

Athipalli Sundararamireddi .. *Appellant**

v.

Athipalli Pattabhiramireddi .. *Respondent.*

Stamp Act (II of 1899), sections 29 (g) and 44—Documents of partition of properties between two brothers—Stamp duties not paid—Proceedings against them—Common default—One of the brothers paying under compulsion—Not entitled to recover from the other the half share of duty paid.

Where two brothers became divided and the partition was evidenced by certain documents, and later, on account of proceedings under section 41 of the Stamp Act, the documents were impounded for the collection of stamp dues, which were paid by one of the brothers, the plaintiff in the case, on the question whether in a suit by him against his brother he could recover half the amount paid by him as stamp dues together with interest thereon,

---

* S. A. No. 1753 of 1944. 6th August, 1945.

Held, that the plaintiff was not entitled to recover it under section 29 (*g*) because of the fact he had paid the amount only as penalty on account of common default and under compulsion to the revenue officer and that section 44 of the Act was intended only to give the right to an innocent party who himself was not guilty of any default in the matter of the proper stamping of a document.

Raman Chetty v. *Nagappa Chetty*, (1915) 2 L.W. 1024 at 1025, applied.

Appeal against the decree of the Court of the Subordinate Judge, Nellore in A. S. No. 94 of 1942, preferred against the decree of the Court of the District Munsiff, Nellore in O.S. No. 134 of 1940.

K. Umamaheswaram for Appellant.

A. Raghaviah for Respondent.

The Court delivered the following

JUDGMENT.—The appellant and the respondent are brothers. They became divided and the partition was evidenced by certain documents. The partition was in 1933. In 1936 the plaintiff who was one of the brothers presented these documents to the Revenue authorities for ascertaining whether the documents should be stamped. Proceedings were accordingly taken under section 41 of the Stamp Act. The Collector found that they had to be stamped and wanted action to be taken under sections 33 and 40. He impounded the documents for collection to be made under section 41. The duty payable and penalty were collected from the plaintiff. The plaintiff paid the amount and has now filed this suit against his brother claiming half the amount paid by him together with interest thereon as also half the expenses incurred by him as costs in the revenue proceedings. He also stated that there was an agreement between him and the defendant under which the defendant has agreed to pay half the amount.

Both the Courts held that under the agreement no amount was payable and the so called agreement was a list of the disputes to be settled between the two parties in future; and they also held following the decision in *Raman Chetti* v. *Nagappa Chetti*[1] that the appellant is not entitled to recover any portion of the duty paid on the documents when he made the payment under orders of the revenue authorities under section 40. It is against this decision dismissing the suit that the second appeal has been filed.

It is urged by the appellant that under section 29 (*g*) the parties to the partition deed have to pay the duties in proportion to their respective shares of the whole prorerty partitioned and secondly the defendant is bound to pay half the amount of both the duty and penalty paid. It was pointed out by a Bench of this Court in *Raman Chetti* v. *Nagappa Chetti*[1], " Section 44 of the Stamp Act was intended to give a right to an innocent party, who himself was not guilty of any default in the matter of the proper stamping of a document, to recover the duty or penalty he was obliged to pay from the person or persons guilty of the default and that it was not intended to enable one of several persons, who were under a common duty to pay the proper stamp in proportionate shares, to claim recovery of the proportionate amount of the duty or penalty, the whole of which he was afterwards obliged to pay owing to the common default." Both the Courts following this decision dismissed the suit.

It is urged by the learned Counsel for the appellant that so far as the claim for payment of half the duty which was payable by the defendant and which has been paid by the appellant is concerned, he is entitled to recover half of it under section 29 (*g*) and since both of them were bound to pay it jointly he is entitled to sue the defendant to contribute his half share. There may be some force in this argument if the amount was paid originally on the document by the appellant and he sought to recover the half share due by the defendant. When both of them failed to pay a common duty and it was by proceedings in Court that he was compelled to pay, the question is whether under the circumstances he would be entitled to recover the half share. The observation of the Bench in *Raman Chetti* v. *Nagappa Chetti*[1],

1. (1915) 2 L.W. 1024.

is general and definite. It deals both with the liability to pay duty as well as penalty. The principle of law enunciated in this decision is binding on me and sitting singly I do not think I will be justified in holding that the plaintiff is entitled to recover any amount.

With regard to the suit based on the agreement, Ex. F, I am in entire agreement with the construction of the document by both the lower Courts that the disputes are to be settled in future, indicating thereby that the disputes had not been settled.

The appeal fails and is dismissed with costs. No leave.

K.C. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Karuppaswami ... *Appellant**

v.

Mrs. P. A. Ibrahim (deceased) and others ... *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 19—*Right of appeal against an order under section* 19 —*Retrospective nature of amending Act (XV of* 1943)—*Civil Procedure Code (V of* 1908), *Order* 21, *rule* 89—*Deposit under—Amount subject to modification.*

A mortgagee decree-holder executed his decree by sale of certain properties and the puisne mortgagee of one of the items sought to set it aside by depositing the balance due under the decree after deducting the amounts realized from the sale of the other properties. Before it was finally disposed of in appeal she filed an application under section 19 of the Madras Agriculturists' Relief Act, the Act having come into force by that time. The application was dismissed by the trial Court on the 3rd February, 1940, but allowed by the first appellate Court. On a contention that such an appeal was incompetent, and that the deposit being unconditional there could be no question of refunding,

Held, (i) that the order under section 19 of the Act was appealable, the right of appeal being retrospective if the order was after 27th October, 1939, when the amending Act is deemed to have come into operation.

Abdul Rasak Rowther v. *Abdul Rahim Rowther*, (1945) 1 M.L.J. 480, distinguished.

(ii) though the deposit under Order 21, rule 89 is unconditional, the amount is always subject to modification before the final order is passed by reason of any subsequent payment towards the decree or by reason of any error in calculation of the amount due or presumably by reason of any deduction in the amount due under the decree by process of law.

Appeals against the orders of the District Court of Ramnad, at Madura, dated 26th November, 1940, in A. S. Nos. 82 and 81 of 1940, preferred against the orders of the Court of the District Munsiff, Srivilliputtur, dated 3rd February, 1940, in I. A. No. 727 of 1939 in O. P. No. 218 of 1931 and dated 11th March, 1940, in E. P. No. 625 of 1935 in O. S. No. 218 of 1931, respectively.

N. Rajagopala Aiyangar for Appellant.

P. S. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The appellant obtained a preliminary decree on a mortgage in 1932, the final decree being dated 19th January, 1933. The preliminary decree provided that the various items should be sold in a certain order, item 1 being sold last. The present contesting respondent the fifth defendant, is a puisne mortgagee of this item 1 which was sold as lot 6. The sale was held on 24th April, 1936, and the property with which we are now concerned was sold to a third party. The fifth defendant made a deposit of Rs. 2,160 and odd which was the amount due under the decree after deducting the prices realised by lots 1 to 5 plus the five per cent. payable to the purchaser and in E. A. No. 663 of 1936 she prayed the sale of lot No. 6 to be set aside. This application was dismissed on 19th November, 1936, on the ground that the deposit was insufficient and the sale was confirmed.

* As. A. A. Os. Nos. 53 and 55 of 1941. 6th August, 1945.

1. (1945) 1 M.L.J. 480.

Against this order an appeal was filed by the fifth defendant, and this appeal was allowed on 12th October, 1937, the order providing for remand of the application to the executing Court which was directed to set aside the sale of lot No. 6 if the sale of lots 1 to 5 was confirmed and otherwise to hold a re-sale of lot No. 6 in order to comply with the direction in the decree that this lot be sold last. Against this order of remand there was an appeal by the purchaser which was dismissed on 21st July, 1939. Meanwhile Madras Act IV of 1938 had come into force and the fifth defendant filed an application under section 19 of that Act praying the Court to amend the decree and record full satisfaction on the basis of the payments already made. There was also an application by the decree-holder for leave to draw out the money deposited into Court. The fifth defendant's application under Act IV was rejected and the decree-holder's application to draw out that deposit was allowed. Against these two orders appeals were filed to the District Court which reversed both the decisions of the trial Court. The two second appeals are now preferred by the decree-holders against the decision of the District Court.

It is contended that no appeal lay against the trial Court's order rejecting the application for relief under section 19 of Madras Act IV of 1938. The appeal purports to have been filed under the rules framed under the Act the validity of which was subsequently challenged successfully. But the amendment to Madras Act IV of 1938 passed by Act XV of 1943 gives a right of appeal against an order under section 19 amending or refusing to amend a decree, or entering or refusing to enter satisfaction in respect of a decree, and this amendment is under section 5 of the Amending Act deemed to have come into operation on the 27th October, 1939. An attempt has been made on the strength of a decision in *Abdul Rasak Rowther* v. *Abdul Rahim Rowther*[1] to contend that this retrospective right of appeal will not save the validity of the appeal to the District Court. It seems to me that the decision quoted has been misunderstood. That was a case where the trial Court's order was passed before the date to which the right of appeal is made retrospective. In the present case the application to scale down the decree was dismissed on the 3rd February, 1940; that is to say, on the date of the dismissal having regard to the retrospective operation of the amending Act, the order was an appealable order and the appeal as decided by the District Judge must be deemed to have been within his jurisdiction having regard to the effect of the Amending Act.

It is further contended that the fifth defendant having made an unconditional deposit of the amount due in respect of this property towards the decree, there can be no question of refunding the amount which she has deposited merely because the decree has been subsequently satisfied by the operation of section 19 of Act IV of 1938. Here again it seems that the appellant must fail. The deposit under Order 21, rule 89 of the Code of Civil Procedure is no doubt unconditional, in the sense that the judgment-debtor has bargained to pay as much money as is due under the decree in return for the cancellation of the sale and he cannot go back on his bargain. But the amount which he has to pay is always subject to modification before the final order is passed by reason of any subsequent payment towards the decree or by reason of any error in calculation of the amount due or presumably by reason of any deduction in the amount due under the decree by process of law. Under the proviso to rule 89 (1) of Order XXI of the Code of Civil Procedure as amended in Madras, it is specially provided that "where the immoveable property sold is liable to discharge a portion of the decree debt the payment under clause (*b*) of the sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay." Under the present decree, the owner of the sixth lot was only liable to pay so much of the decree amount as remained after the sale of the first five items. This amount was something less than the amount deposited at the time when the deposit was made. But by a subsequent judicial proceeding, the amount of the balance of the decree has been reduced

1. (1945) 1 M.L.J. 480.

to nothing. On no consideration can the decree-holder be held entitled to draw out the Court deposit which is totally in excess of the amount due to him under the decree, nor is there any reason for refusing to refund this excess to the depositor. In this view I agree with the decision of the lower Court on both the appeals and dismiss both the appeals with costs. (One Advocate's fee in Appeal No. 53 of 1941.)

V.P.S. —— *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Court of the Hon'ble the British Resident in Mysore at Bangalore.)

PRESENT :—LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

J. Subbiah Reddy (since deceased) and another ... *Appellants**

v.

T. Jordon ... *Respondent.*

Tort—Master and servant—Scope of authority—Negligence of servant—Liability of master—Amount of damages—Finding of trial Court—Competency of appeal Court to interfere.

The second defendant was the owner of a motor concern. The plaintiff was negotiating for a position in that concern. One day, while the plaintiff was waiting for the draft of a proposed agreement between himself and the firm being typed, he was taken out by the first defendant, the son of the second defendant and employed in his business, in a car belonging to the second defendant and driven by the first defendant with a view to demonstrate its performance. In the course of the drive there was an accident due to the negligence of the first defendant as a result of which the plaintiff's left arm was severely injured and had to be amputated. In a suit for damages by the plaintiff against defendants No. 1 and No. 2, on a question whether defendant No. 2 was also liable,

Held, that the car in which the accident occurred belonged to the second defendant and was used in connection with his business; it was being driven by his son, who was employed in the business; and the car was being demonstrated to one about to join the business, that is, for the purposes of the business. It was clear, therefore, that defendant No. 1 was acting within the scope, or apparent scope of his authority as a servant of defendant No. 2, and the latter was answerable for his tort.

On a further question whether the appeal Court has a right to interfere with the amount of damages found by the trial Court,

Held, that the full rigour of the rule stated in *Flint* v. *Lovell*, (1935) 1 K.B. 354, does not apply in British India. In British India civil suits are not tried with a jury, and trial Judges generally have less experience in assessing damages for tort than have judges in England, where such claims are very common. An appeal Court should never interfere arbitrarily and without good reason with the decision of the lower Court, and upon questions of fact the advantage which the trial Judge enjoys in having seen the witnesses, and sometimes in knowledge of local conditions, must always be recognised; but where such considerations do not operate, an appeal Court is entitled, and indeed bound to give effect to its own view on matters within its competence. To hold otherwise would be to deprive the parties of the benefit of a right of appeal which they possess.

Appeal from the decision of the Additional Judge of the Court of the Hon'ble the British Resident in Mysore at Bangalore.

Phineas Quass for Appellants.

Respondent not represented.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from the judgment and decree of the Additional Judge of the Court of the Honourable the British Resident in Mysore, Bangalore, dated 14th August, 1940, varying a judgment and decree of the District Judge, Bangalore, dated 20th November, 1939.

The claim of the plaintiff was for damages for injuries sustained by him in an accident to a motor car in which he was a passenger. He sued J. G. Anniah Reddy, the first defendant and second appellant who was the driver of the car, and his father J. Subbiah Reddy, the second defendant and original first appellant, who

* P.C. Appeal No. 52 of 1943. 18th June, 1945.

was the owner of the car. Subbiah died on 20th December, 1940, and appellants (*i*) to (*xvi*) are his legal representatives.

The material facts are that in September, 1937, the plaintiff who was a motor engineer and salesman, was negotiating for a position in International Motors, Bangalore, a concern owned by defendant No. 2, in which defendant No. 1 was employed. In the morning of 27th September, whilst the draft of a proposed agreement between plaintiff and the firm was being typed, defendant No. 1 took the plaintiff out in a Skoda car in order to demonstrate the performance of the car. In the course of the drive there was an accident due to the failure of defendant No. 1, who was driving, to notice an obstruction across the road in time to avoid it. The car overturned, and the plaintiff's left arm was severely injured, and eventually had to be amputated below the elbow. Both the lower Courts held that the accident was caused by the negligence of defendant No. 1 and in their Lordships' view this finding, which is one primarily of fact, is clearly right, and must be accepted. The trial Judge passed a decree against defendant No. 1 for Rs. 12,500 damages, but dismissed the suit against defendant No. 2. In appeal the Additional Judge increased the damages to Rs. 25,000 and reversed the decree dismissing the suit against defendant No. 2. In the result he passed a decree against both defendants for Rs. 25,000 and costs.

Their Lordships feel no doubt that the Additional Judge was right in holding defendant No. 2 liable. The car in which the accident occurred belonged to him, and was used in connection with his business; it was being driven by his son, who was employed in the business; and the car was being demonstrated to one about to join the business, that is, for the purposes of the business. It is clear, therefore, that defendant No. 1 was acting within the scope, or apparent scope, of his authority as a servant of defendant No. 2, and the latter is answerable for his tort.

The only question which requires consideration on this appeal is that of damages and this raises a question of some importance. The respondent has not appeared, but Mr. Quass for the appellants has argued that the Additional Judge had no right to interfere with the amount of damages found by the lower Court. He relies upon the rule acted upon by the Court of Appeal in England which was stated recently by Greer, L.J., in *Flint* v. *Lovell*,[1] in these terms:

"This Court will be disinclined to reverse the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance, they would have given a lesser sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

This rule originated at a time when the assessment of damages was the province of the jury, and illustrates the reluctance which an Appellate Court always feels in interfering with the decision of a trial Court upon a question of fact, especially, when the decision is that of a jury. In British India Civil Suits are not tried with a jury, and trial judges generally have less experience in assessing damages for tort than have Judges in England, where such claims are very common. An Appeal Court should never interfere arbitrarily and without good reason with the decision of the lower Court, and upon questions of fact the advantage which the trial Judge enjoys in having seen the witnesses, and sometimes in knowledge of local conditions, must always be recognised; but where such considerations do not operate, an Appeal Court is entitled, and indeed bound, to give effect to its own view on matters within its competence. To hold otherwise would be to deprive parties of the benefit of a right of appeal which they possess. Their Lordships see no sufficient reason for holding that in British India the full rigour of the rule stated in *Flint* v. *Lovell*[1] applies. They think, therefore, that the Additional Judge was

---

1. (1935) 1 K.B. 354.

entitled to act upon his own view as to the amount of damages, and they proceed to consider how far his award was justified by the evidence.

The plaintiff claimed Rs. 60,000 as damages. The trial Judge (as already mentioned) assessed the damages at Rs. 12,500. He based this figure upon the general claim for disfiguration, loss of health, pain and suffering, and expenses of treatment, and on the handicap which the plaintiff would suffer in his earning capacity by the loss of an arm. The learned Judge, however, stated that the reduction of the plaintiff's income had not been shown nor could it be said, to be due wholly or even largely to the injury he had received. Therein the learned Judge was not correct. The evidence of the plaintiff was that down to the month of the accident he had been employed by Mysore Motors at a salary of Rs. 200 a month and a commission which brought his total earnings up to Rs. 350 to Rs. 400 a month. The manager of Mysore Motors put the commission at Rs. 125 to 150 a month. The plaintiff further gave evidence that owing to the loss of his arm he was unable to obtain a licence to drive a car, and that his earnings at the time of the trial were Rs. 80 salary and commission, bringing his total earnings up to Rs. 130 a month. His employer put the latter figure at Rs. 140. There is, therefore, satisfactory evidence that the earnings of the plaintiff had been reduced by about Rs. 200 a month since the accident, and it is a legitimate inference that the reduction was the result of the accident, since it is obvious that loss of an arm and consequent inability to drive a car must be a serious handicap to a motor salesman. In appeal the Additional Judge doubled the damages, but gave no detailed reasons for so doing. Damages for tort are based on the loss suffered by the plaintiff and the consideration that the decree of the Appeal Court was against an additional defendant who might be in a better position to pay than the defendant originally held solely liable is irrelevant. Their Lordships think that the Additional Judge was not justified on the materials before him in awarding so large a sum as Rs. 25,000, but on the other hand, that the trial Judge did not give sufficient weight to the evidence of actual loss of earning capacity by the plaintiff. In their Lordships' view Rs. 15,000 is a fair sum at which to assess the damages.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the Additional Judge be varied by reducing the sum decreed from Rs. 25,000 to Rs. 15,000. In other respects, the decree will stand, and there will be no order as to the costs of this appeal.

Solicitors for Appellants: *Messrs. Douglas, Grant and Dold.*

V. S. ——— *Decree varied.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD PORTER, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Sri Raja Bommadevara Naganna Naidu Bahadur Zamindar Garu .. *Appellant**

v.

Sri Raja Bommadevara Venkatarayulu Naidu Bahadur Zamindar Garu and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 90, 66 (2) (b) and 67 read with 54 (2)—Setting aside sale—Requirements to be proved—Nature of evidence that would discharge the burden of proof—No mention of revenue in sale proclamation—Not a material irregularity when no separate revenue has been fixed on the portion of the estate sold—Omission to affix the sale proclamation in the Collector's office—Adequate publicity given to sale—Irregularity not a material one.

---

* P. C. Appeal No. 8 of 1942. 30th July, 1945.

Upon the language of the proviso in rule 90 of Order 21, Civil Procedure Code, as it now stands, what is required is that the Court should be satisfied that the applicant to set aside the sale has suffered substantial injury by reason of material irregularity or fraud, and if the Court is so satisfied from the facts proved, then the applicant may be said to have discharged his burden. This burden may be discharged not only by direct evidence connecting the material irregularity or fraud with the substantial injury, but also by circumstantial evidence, that is, evidence from which a reasonable inference may be drawn that the substantial injury was the result of the material irregularity or fraud.

The omission to state in the proclamation of sale the revenue on an estate or part of an estate paying revenue to Government as required by rule 66 (2) (*b*) of Order 21, where it is possible to state the amount accurately or even approximately is a material irregularity within the meaning of the rule. But the rule can have no application to a case where the property sold is a portion of an estate upon which no separate revenue has been fixed.

Ordinarily the omission to affix the sale proclamation in the Collector's office as prescribed by rule 54 (2) of Order 21 read with rule 67 of the same order, would indeed be a material irregularity as it is a non-compliance with the procedure prescribed by law. But where the Collector's office and the District Judge's Court are situated in the same compound and the copy of the sale proclamation is shown to have been affixed in the District Judge's Court and otherwise also wide publicity given to the sale, the breach of the rule can hardly amount to a material irregularity.

S. P. Khambatta for Appellant.

C. S. Rewcastle, K.C. and *P. V. Subba Rao* for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This appeal arises out of an application by the appellant who is a judgment-debtor to set aside a Court sale of six items of property belonging to him which were sold in execution of the decree in Original Suit No. 38 of 1919 in the Court of the Subordinate Judge of Ellore, obtained against him by the first respondent, the decree-holder. This appeal relates only to three items of the properties; these being items 4, 5 and 6, specified in the sale proclamation. At the sale the properties were purchased by the decree-holder himself. The application to set aside the sale was made under Order 21, rule 90, of the Code of Civil Procedure which empowers the Court to set aside a sale " on the ground of material irregularity or fraud in publishing or conducting it." This power of the Court is subject to the proviso " that no such sale be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

The Subordinate Judge of Ellore to whom the application had been made, set aside the sale on the grounds that the sale proclamation did not mention the revenue assessed on the properties as required by Order 21, rule 66 (2) (*b*), and that the sale proclamation was not published in the Collector's office as required by Order 21, rule 54, read with rule 67 of the Code of Civil Procedure; and that as a result of these irregularities the appellant had suffered substantial injury in that the sale prices were unreasonably low. The High Court of Madras reversed this decision by its Order, dated 23rd January, 1940, holding that in the circumstances of the case the omission to mention the Government revenue was not a material irregularity; and that the failure to affix the sale proclamation in the Collector's office, though it was an irregularity, caused no substantial injury to the appellant. This appeal has been brought against the above decision of the High Court. Besides the irregularities referred to, the appellant had alleged also fraud in his petition, but both the Courts in India have found that no fraud had been committed.

The question for determination in this appeal is whether or not the appellant is entitled to set aside the Court sale by reason of the above-mentioned irregularities.

In order to set aside a sale under Order 21, rule 90, it should be proved (1) that there was material irregularity or fraud in publishing or conducting the sale and (2) that the applicant had sustained substantial injury by reason of such irregularity or fraud. Mere irregularity or fraud in publishing or conducting the

sale will not entitle the Court to set it aside, unless upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

The words in the proviso " unless upon the facts proved, the Court is satisfied " have been substituted in the present Code for the words " unless the applicant proves to the satisfaction of the Court " in the proviso to section 311 of the Code of 1882. In the course of the arguments the question was raised in connection with the High Court's observation " Nor is there any evidence to connect this irregularity (failure to affix the notice in the Collector's office) with any defect in price," as to whether the substantial injury sustained by the applicant by reason of the material irregularity or fraud complained of could be proved only by " direct evidence " as stated in the judgment of the Board in *Tasadduck Rasul Khan* v. *Ahmad Husain*[1] or if it could be proved also by evidence from which it might be reasonably inferred that the substantial injury was the result of the material irregularity or fraud. It appears to their Lordships that upon the language of the proviso as it now stands, what is required is that the Court should be satisfied that the applicant has suffered substantial injury by reason of material irregularity or fraud, and if the Court is so satisfied from the facts proved, then the applicant may be said to have discharged his burden. Their Lordships think that this burden may be discharged not only by direct evidence connecting the material irregularity or fraud with the substantial injury, but also by circumstantial evidence, that is, evidence from which a reasonable inference may be drawn that the substantial injury was the result of the material irregularity or fraud as pointed out in *Ramasesha Iyer* v. *Ramanujachariar*[2], where all the relevant decisions have been considered. The Madras and Calcutta High Courts have always been of this opinion. Sir Dinshaw Mullah says in his commentary on the rule that the amendment of the language of the proviso was made to give effect to the Madras and Calcutta decisions. The High Court of Allahabad which followed the rigid construction has now adopted the new rule. [See *Rajendra Behari Lal* v. *Gulzari Lal.*[3]]

Turning now to the essential facts of the case, the appellant is the proprietor of the North-West Vallur estate consisting of about 34 villages in Kistna and West Godavari Districts paying an annual *peshkash* (revenue) of Rs. 42,000. The first respondent is his brother. In the partition of the main estate between himself and his brother, the appellant got 20 villages as his share and he has since purchased 14 villages in the two districts for which he had borrowed considerable sums of money. As he had failed to discharge these debts, his creditors brought suits against him and obtained decrees. In enforcement of the decree obtained by the first respondent in the partition suit (Original Suit No. 38 of 1919) for about Rs. 46,000 he brought the properties in dispute for sale and, as mentioned before, purchased them himself. The first irregularity alleged is the failure to mention in the sale proclamation the revenue assessed on the properties as required by Order 21, rule 66 (2) (*b*). This rule lays down that the proclamation for sale shall specify " as fairly and accurately as possible " " the revenue assessed upon the estate or part of the estate where the property to be sold is an interest in an estate or part of an estate paying revenue to the Government." The allegation that the revenue due on each of the properties has not been specified is not denied by the first respondent, his case being that in those cases where the proclamations do not specify the revenue payable it was impossible in the circumstances of the case to specify the revenue as the revenue due on the properties had not been separately fixed. The learned Judges of the High Court state in their judgment :

1. (1893) L.R. 20 I.A. 176 : I.L.R. 21 Cal. 66 (P.C.).
2. A.I.R. 1935 Mad. 459.
3. (1933) I.L.R. 55 All. 182.

"So far as we can ascertain in all these sales wherever the proclamations do not specify the revenue payable, the property to be sold consists of either a village or part of a village with reference to which no one can say with any certainty what would have been the proportionate *peshkash* payable if and when the procedure laid down for the separate registry of those portions is carried out."

It is not disputed that no steps had been taken to effect separate registration of the properties and their separate assessment by resorting to the procedure prescribed by law. The learned Judges point out that even in the case of whole villages put up for sale (as in the connected C. M. A. No. 378 before them) where a rough approximation of the revenue might possibly have been made, they found three different estimates of the proportionate *peshkash* in the evidence varying to a very considerable extent. It would seem that the appellant himself who stated that the *peshkash* for a group of villages in another connected C. M. A. was a certain amount was unable to say how much was due on each village. Their Lordships have no doubt that omission to state the revenue on an estate or part of an estate paying revenue to the Government, where it is possible to state the amount accurately or even approximately, is a material irregularity within the meaning of the rule, but in their view the rule can have no application to a case like the present in which the property sold is a portion of an estate upon which no separate revenue has been fixed. They agree with the High Court in holding that in the circumstances of the present case the failure of the decree-holder to state the revenue payable on the lands cannot be treated as a material irregularity. The question whether it has been proved that the appellant has sustained any substantial injury by reason of the irregularity does not therefore arise for consideration.

The next irregularity alleged is the omission to affix the sale-proclamation in the Collector's office as prescribed in Order 21, rule 54 read with rule 67 of the Code of Civil Procedure. Ordinarily, the omission to affix the proclamation in the Collector's office would indeed be a material irregularity as it is a non-compliance with the procedure prescribed by law, but in the circumstances of the present case the breach of the rule can hardly be called a material irregularity. It is stated in the judgment of the High Court that the Collector's office and the District Judge's Court are situated in the same compound and it is not denied that a copy of the proclamation was duly affixed in the District Judge's Court. Further, evidence shows that the sale was widely advertised in various daily papers. The object of the rule requiring affixture of the sale proclamation in the Collector's office is to give sufficient publicity to the sale; where such publicity has been given to the sale as in the present case the irregularity complained of can hardly amount to a material irregularity. Assuming, however, that the omission amounts to a material irregularity it has not been proved by evidence direct or circumstantial that the inadequate price which the properties fetched at the sale as found by the Subordinate Judge, was by reason of this irregularity. Their Lordships have been taken through the material portions of the evidence bearing on the point but are not satisfied that the defect in price could be attributed to this irregularity.

For the above reasons their Lordships would humbly advise His Majesty that the appeal fails and should be dismissed with the costs of the first respondent.

Solicitors for Appellant: *Lambert and White.*

Solicitors for Respondents: *Hy. S. L. Polak.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR.

Kanuparthi Gangi Reddi .. *Appellant**

v.

The Liquidator of Utukur Co-operative Society (in liquidation) being the Deputy Registrar of Co-operative Societies, Cuddappah and others .. *Respondents.*

Madras Co-operative Societies Act (VI of 1932), sections 25 and 47—Society going into liquidation—Levy of contribution by liquidator more than two years after the date of the winding up against member who had ceased to be a member prior to liquidation—Section 25, not a bar to such a levy.

A certain co-operative society went into liquidation on 4th February, 1933. Sometime before the liquidation, on 1st December, 1932, the plaintiff ceased to be a member of the society. The liquidator appointed to wind up the society levied contribution against the plaintiff amongst others on 20th January, 1940. On the question whether the plaintiff's liability under section 25 of the Madras Co-operative Societies Act ceased on the lapse of two years from the date of his ceasing to be a member of the society and whether therefore the order for contribution passed was not valid,

Held, that section 25 obviously refers to the liability of past members or the estate of deceased members in respect of a debt owing to third parties by the society as such. It was quite clear that the plaintiff was not being made liable for such a debt as is contemplated by the section. An order made for contribution by a liquidator is not dependent, nor is it consequent on a debt due by a registered society and that in the circumstances the order for contribution was not illegal.

Belahri Co-operative Society v. *Puttu Lal*, (1941) I.L.R. 16 Luck. 658, applied.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddappah in A. S. No. 85 of 1943, preferred against the decree of the Court of the District Munsiff, Cuddappah, in O. S. No. 359 of 1941.

K. Srinivasa Rao for Appellant.

N. Panchapakesa Aiyar for 1st Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises no doubt a question of law depending on the construction of two sections of the Madras Co-operative Societies Act (VI of 1932), but in my opinion there can be only one answer to the question raised. The appellant before us was a member of the Utukur Co-operative Society which went into liquidation on 4th February, 1933. Sometime before the liquidation, on the 1st December, 1932, the first plaintiff, the appellant herein, ceased to be a member of the society. The liquidator appointed to wind up the society levied contribution against the plaintiffs amongst others on or about the 20th January, 1940. The plaintiffs appealed to the Registrar of Co-operative Societies against the order for contribution but the Registrar rejected the appeal. There was a revised order for contribution passed against the plaintiffs on the 25th November 1940, and the plaintiffs with the leave of the Registrar instituted the suit from which the present appeal arises for a declaration that the contribution levied is not valid. In short, the contention of the plaintiffs was that under section 25 of the Act their liability to pay contribution ceased on the lapse of two years from the date of their ceasing to be members and therefore the order for contribution passed by the liquidator under section 47 was illegal. Both the Courts below have rejected this contention and held that section 25 is not a bar to the claim for contribution. The first plaintiff appeals.

Section 25 of the Act is in these terms:

"The liability of a past member or of the estate of a deceased member for the debts of a registered society as they existed on the date of his ceasing to be a member or of his decease, as the case may be, shall continue for a period of two years from such date."

This section obviously refers to the liability of past members or the estate of deceased members in respect of a debt owing to third parties by the society as such. It is quite clear that the plaintiff is not being made liable for such a debt as is contemplated by the section. An order for contribution made by a liquidator is not dependent, nor is it consequent, on a debt due by a registered society. Though there is

*S. A. No. 1553 of 1944. 27th July, 1945.

no decision of this Court on this point, I have been referred to a decision reported in *Belahri Co-operative Society v. Puttu Lal*[1], which appears to support the view that I am taking. It was there held that the words "the debts of a registered society as they existed at the time when he ceased to be a member" in section 23 of the Co-operative Societies Act, 1912 (Imperial Act) clearly refers to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years and no further. The decision of the lower Courts on this point is right. There is no other point which arises in this appeal which is dismissed with costs. (Leave to appeal is refused.)

K.C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

A. L. V. R. S. T. Veerappa Chettiar and another .. *Appellants**

v.

Thangachami Naicker and others .. *Respondents.*

Charitable endowment—Choultry—Foundation by owner of impartible estate—Situation outside estate and maintenance out of separate endowment—Trusteeship in Zamindar for the time being—Transfer of estate—Trusteeship cannot pass as annexe to the impartible estate.

Apart from cases where an estate is impartible by reason of the tenure or grant on which it is held, where a stranger becomes by purchase or otherwise the owner of an impartible estate, the estate is no longer impartible in his hands. Hence when the impartible estate is transferred to a stranger in whose hands the estate will not continue to be impartible, the trusteeship of a religious or charitable institution founded by the owner thereof cannot be held to pass as an annexe to the impartible estate even if it is found as a fact that so long as the original family held the Zamindari the trusteeship vested in the Zamindar for the time being. The position is beyond argument in a case where the charity—a choultry for the feeding of wayfarers—is situated outside the estate and is maintained out of the income derived from properties endowed or purchased for the trust.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in O. S. No. 29 of 1942.

S. Ramachandra Aiyar for Appellants.

B. Sitarama Rao, C. A. Seshagiri Sastri and *R. Swaminatha Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question arising for decision in this appeal is whether the trusteeship of the suit choultry founded for feeding wayfarers goes with the ownership of the impartible estate and passes even to a stranger when he becomes the transferee of the estate. The suit choultry is situate at Teni, midway between the headquarters of the Thevaram Zamindari, which is an impartible estate in Madura district, and Madura, the headquarters of the district. The choultry was founded between 1875 and 1877 by Konda Bommu Naicker, the then Zamindar of the Thevaram Zamin. For the upkeep and conduct of the charity Konda Bommu Naicker endowed certain lands, shops and buildings situate in several villages. The village of Teni where the choultry is situate is outside the Thevaram Zamindari. The appellants' case is that the founder intended the choultry to be annexed to the Zamindari itself and that whosoever is the Zamindar for the time being of the Thevaram Zamin is to be the trustee and manager of the choultry. It is also said that by the usage of the institution the Zamindar for the time being is entitled to the trusteeship of the suit choultry.

After Konda Bommu Naicker who died in 1877, his eldest son Shanmughavalla became the Zamindar and he was also the trustee of the suit choultry and after him his daughter Bangarammal succeeded to the trusteeship. By a compromise in O. S. No. 31 of 1925, Bangarammal transferred the Zamindari in favour of the first plaintiff who is a stranger belonging to another caste altogether. Respondents 2 to 5 are Konda Bommu Naicker's brother's daughter's sons and they claim as the

1. (1941) I.L.R. 16 Luck. 658.

* Appeal No. 146 of 1944. 19th July, 1945.

nearest heirs of the original founder. The first respondent is Shanmugavalla's wife's brother's son and is now in management claiming the right under a will said to have been executed by Shanmugavalla's widow. The first plaintiff in the lower Court and the first appellant here is the present proprietor of the Thevaram Zamindari. The second plaintiff in the lower Court and the second appellant here is described to be the choultry itself represented by the trustee the first appellant. It is enough to refer to the first appellant as the appellant as it is his individual right that is questioned in this litigation. We are not concerned with the title of the respondents and the only question is whether the appellant is entitled to the trusteeship of the choultry in question. The lower Court held that the trusteeship did not pass to the appellant and that an alienee of the estate does not become the trustee of the choultry. The suit was accordingly dismissed and hence this appeal.

The appellant's learned advocate urges that the intention of the founder was that whoever is the Zamindar for the time being should also be the trustee of the choultry in question. He also urges that the usage of the institution is also that the trusteeship should be in the Zamindar for the time being. We cannot accept these arguments. There is no deed of trust and we are asked to gather the intention of the founder from the devolution of the trusteeship after the founder's death. The alleged usage is also based on the same considerations. The trust came into existence only in 1875 and there has not been time enough for any usage to grow. There have been only two successions and the mere fact that after the original founder, his eldest son succeeded both to the Zamindari and to the trusteeship of the choultry and that after him his daughter did so is not enough to found a case of usage upon. Reliance is placed by the appellant upon a partition deed executed by Shanmugavalla and his brother under which the trusteeship was allotted to Shanmugavalla and a provision made that if Shanmugavalla mismanaged the property the Local Fund authorities should take over the management. We are of opinion that this partition deed does not afford any basis for the appellant's claim. Both the sons of the original founder are parties to the document, and they both agreed that the elder should be the trustee. The document does not indicate that even without the consent of the younger brother the elder would have succeeded either by reason of the presumed intention of the settlor or in conformity with any usage of the institution. The provision that in the case of mismanagement, the management should be taken over by the Local Board authorities is really against the appellant's contention. The trusteeship was not considered to be always an annexe of the Zamindari. Similarly when Bangarammal succeeded, she did so by the will of her father Shanmugavalla and the will expressly passes the trusteeship of the choultry in question. By that time Shanmugavalla's brother had died leaving only a widow and Shanmuga's daughter would succeed as his heir at any rate after his widow's death. The widow obviously did not mind her daughter getting the estate and the trusteeship even during her lifetime. Here again it is under an express devise that Bangarammal got it. No doubt Shanmugavalla was the holder of the Zamindari and so was Bangarammal. But these facts are not enough to enable the Court to presume that the intention of the settlor was that the trusteeship should vest in the Zamindar for the time being or that an usage has sprung up to that effect which could be recognised by a Court of law; much less can we presume that even a stranger who becomes entitled to the Zamindari is to be the trustee of the choultry.

It is argued that the choultry is an annexe of the Zamindari itself and that the management passes with the Zamindari. We are not satisfied that there is any basis for the argument that the choultry is an annexe of the Zamindari. Mr. Rajah Ayyar, the learned advocate for the appellant, has referred us to certain documents which describe the choultry as the Zamin choultry. These documents have been analysed at length by the lower Court in paragraphs 31 to 34 of its judgment. We entirely agree with the view taken by the lower Court as regards these documents. The choultry has properties of its own and it is not shown that it is maintained

from the general income of the Zamindari. Even if a choultry or a temple is maintained out of the income of the estate, it may give the institution a right to be maintained out of the income of the estate even when the estate passes to a stranger but that by itself would not make the alienee the trustee of the institution.

Further, in a case where the trusteeship of a choultry or a religious institution devolves on the person who succeeds to an impartible estate, where the estate itself is transferred to a stranger, the right to the trusteeship will not vest in the transferee of the estate. The character of impartibility is attached to certain estates by family custom. It will hardly be correct to say that impartibility may arise out of a local custom. It is difficult to postulate that all estates in a particular locality are impartible. At any rate, it is not so in this country. Whenever an estate has been alleged to be impartible, evidence has been required to show that by the custom obtaining in the family, the estate is not partible. In some other cases where the estate is held on a military or some service tenure, or under a crown grant, impartibility has been held to attach by reason of the tenure or by the terms of the crown grant. Apart from cases where an estate is impartible by reason of the tenure or grant on which it is held, it is clear that where a stranger becomes by purchase or otherwise the owner of an impartible estate, the estate is no longer impartible in his hands. This view is supported by section 7 of the Madras Impartible Estates Act (Madras Act II of 1904) which provides that the provisions of the Act do not apply where the estate is transferred to a stranger. Hence when the impartible estate is transferred to a stranger in whose hands the estate will not continue to be impartible, the trusteeship of a religious or charitable institution cannot be held to pass as an annexe to the impartible estate even if we take it that so long as the original family held the Zamindari, the trusteeship vested in the Zamindar for the time being. We agree with the statement of the law on this subject in P. R. Ganapathi Iyer's Law of Hindu and Muhammadan Religious Endowments, pages 476 and 477 :—

"Where the office is attached to an impartible Zamindari and follows the line of devolution applicable to Zamindari, and the Zamindari ceases to exist as in a case where the person holding the Zamindari sells or alienates it to a person who is not governed by the family custom of impartibility, the office cannot devolve on the purchaser of the Zamindari."

The expression "and the Zamindari ceases to exist" obviously means "the Zamindari ceases to exist as an impartible estate." The position is beyond argument in a case where the charity is outside the estate and is maintained out of the income derived from properties endowed or purchased for the trust.

The appeal fails and is dismissed with costs—one set. Advocate's fee to be divided equally between respondents 1 to 5 (one half) and respondents 7 and 10 (the other half).

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH.

Kondamuri Akkamma ... *Appellant**

v.

Bhuvanavaidiyala Pichamma and others .. *Respondents.*

Hindu Law—Widow—Suit for recovery of property—Compromise giving her some of the properties claimed—Nature of estate taken.

In a suit by *V*, a widow, against the nephews of the *P* deceased widow of her brother-in-law claiming possession of 3.80 acres alleged to have been given by *V's* deceased husband to *P* with a stipulation that *P* should enjoy the land during her lifetime and that thereafter it should pass to the plaintiff's family. The defendants contended that *P* was absolutely entitled to the land and had conveyed it to one of them by a deed of gift. A compromise was effected after hearing the contentions which after reciting the facts provided that the defendants shall deliver to *V*, 1.56 acres out of the land in dispute and shall themselves be absolute owners of the remaining land. On the death of *V*, on a question as to the nature of the estate taken by *V* in respect of the land obtained under the compromise,

* S. A. No. 1706 of 1944. 20th April, 1945.

Held, that the compromise merely acknowledged the title which *V* claimed and purported to confer no new title upon her. Accordingly, *V* got only a limited estate and not an absolute estate.

Rani Mewa Kuwar v. *Rani Hulas Kuwar*, (1874) L.R. 1 I.A. 157 (P.C.), applied and *Nathu Lal* v. *Babu Ram*, (1935) L.R. 63 I.A. 155 (P.C.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, dated 18th February, 1944, in A. S. No. 60 of 1942, preferred against the decree of the Court of the District Munsiff, Ongole, dated 9th March, 1942, in O. S. No. 120 of 1938.

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—The appellant was the plaintiff in a suit for partition and mesne profits. The following genealogical tree will help to elucidate the contentions of the parties:—

Subbayya : Pichamma (d. 1911). Venkayya : Venkamma (d. 1935)

1st Defendant Plaintiff.

2nd Defendant.

The last maleholder, Venkayya, died about 50 years ago, leaving a widow and two daughters. On 8th October, 1908, the widow, Venkamma, made two gift deeds, comprising the whole of the properties which she had got from her husband, in favour of her two daughters, the first defendant under Ex. D-1 getting the larger share and the plaintiff under Ex. D-2 getting the smaller share. In 1912 Venkamma filed a suit against the nephews of Pichamma the deceased widow of her brother-in-law claiming possession of 3.80 acres alleged to have been given by the late Venkayya to the late Pichamma with a stipulation that she should enjoy the land during her lifetime and that thereafter it should pass to the plaintiff's family. The nephews of Pichamma contended that Pichamma was absolutely entitled to the land and had conveyed it to one of them by a deed of gift. A compromise was effected on the advice of mediators after hearing the contentions of both parties. The compromise (Ex. D-10) recites these facts and provides that the defendants shall deliver to the plaintiff Venkamma 1.56 acres out of the land in dispute and shall themselves be absolute owners of the remaining land.

On the death of Venkamma, the appellant filed the present suit claiming partition not only of the lands covered by the two gift deeds of 1908, but also of the land got under the compromise decree, which Venkamma had in 1932 conveyed to her grandson the second defendant by a gift deed which is Ex. D-3. Both the Courts below have held that the two gift deeds of 1908 amounted to a complete surrender of the whole estate in favour of the nearest reversioners and it seems to me that this decision is undoubtedly right. An attempt has been made to argue that there was no surrender of the whole estate because the gift deeds did not comprise the properties held for life by Pichamma, the sister-in-law of the last maleholder. But in 1908 the most that Venkamma could be said to have with reference to these lands was an expectancy. It cannot therefore be said that these lands formed part of the estate of the last maleholder which was vested in her.

A more difficult question relates to the right of the appellant to claim partition of the property got by Venkamma in 1912 under the compromise and now claimed by the second defendant. In dealing with this question the trial Court went into the question of title which was in issue in the suit of 1912, and held, that by reason of certain enfranchisement proceedings which recognised both Pichamma and Venkayya as inamdars of the land which included the plot in dispute, Pichamma had a good title thereto and Venkamma's claim was unfounded. It was therefore decided that any title which Venkamma got under the compromise must have been

a gift of an absolute estate which pass by the later gift to second defendant. The lower appellate Court purporting to follow the decision of the Privy Council in *Nathu Lal* v. *Babu Ram*[1] and distinguishing, on grounds which seem to me inadequate, the decision of this Court in *Nagabhushanam* v. *Anandayya*[2] held that Venkamma must be deemed to have filed a frivolous suit and that the title which she got under the compromise must be not the title which she was claiming, but an absolute estate.

The effect of *Nathu Lal's case*[1] has been considered in the last case cited and it has been pointed out that there is nothing therein which conflicts with the decision of the Judicial Committee in *Rani Mewar Kuwar* v. *Rani Hulas Kuwar*[3] and later cases to the effect that when a person puts forward a claim based on a pre-existing estate and that claim is to some extent recognised by a compromise, that compromise will be interpreted in the light of the claim which was put forward and the estate which will pass will be an estate similar to that which was claimed. In *Nathu Lal's case*[1], their Lordships hold that this principle cannot be applied, because in the award which was under consideration there was a finding that the case asserted by the widow was not true and a recital that she had admitted before the arbitrators the truth of the facts asserted by her adversaries, so that there was an obvious impossibility in applying the ordinary rule that the title which she got under the award would be deemed to be the title which she claimed in the absence of any indication to the contrary.

It has been contended for the respondents by Mr. Satyanarayana Rao that *Nathu Lal's case*[1] is authority for the position that when there is a title obtained under a compromise, the Court which has afterwards to find the nature of that title should ignore the compromise, go into the contentions of the parties and come to a decision as to the merits of the controversy terminated by the compromise and in the light of that decision, find what was the title granted or recognised under the compromise. Accordingly, it is argued that on a true understanding of the controversy between Venkamma and Pichamma's donees, Venkamma's case will be found to have no merits and that therefore the gift to Venkamma can only be regarded as an *ex gratia* transfer of property to which she had no antecedent title. It seems to me that this contention ignores the rule laid down in *Rani Mewa Kuwar's case*[3] and puts forward a proposition for which authority cannot be found in *Nathu Lal's case*[1]. The *ratio decidendi* of the latter case was not the subsequent judicial determination of the title considered in the award proceedings, but the fact that the award itself contains a clear indication of the nature of the title given to the widow, so as to leave no room for inference from the nature of her claim which she had expressly abandoned before the arbitrators.

There is no such indication in the compromise with which we are now concerned. There was apparently no finding that Venkamma's case was a bad one, nor was there any admission by her from which it could be inferred that she took what she got as a gift from persons who were absolutely entitled. The very fact that under the compromise she is merely given possession of 1.56 acres, while the defendants are to be absolute owners of the balance, seems a positive indication that the compromise merely acknowledged the title which she claimed to the extent of 1.56 acres. It purports to confer no new title upon her. This seems to me to be emphatically a case to which the rule in *Rani Kuwar's case*[3] should be applied.

In the result, therefore, the appeal is allowed to this extent that the plaintiff will be declared entitled to partition and possession of a half share in the property covered by Ex. D-3 with mesne profits as against the second defendant at a rate to be determined by the trial Court. The appellant will pay costs throughout to the first defendant and will receive proportionate costs throughout from the second defendant. Leave refused.

K.S. — *Appeal allowed.*

1. (1935) L.R. 63 I.A. 155 (P.C.).
2. (1939) 1 M.L.J. 170.
3. (1874) L.R. 1 I.A. 157 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BELL.

In the matter of Wakf, Paramathi, Namakkal Taluk

Khazhi Mohiuddin Sheriff Sahib, Khazi of Paramathi .. .. *Petitioner.**

Mussalman Wakf Act (XLII of 1923), section 3—District Judge calling upon mutavalli to file statements regarding the finances of the trust—Action suo motu—*District Judge has no jurisdiction.*

A District Judge of his own accord called upon the mutavalli of a wakf to file certain statements regarding the finances of the trust, including a statement of the portion of the annual income beneficially taken by the mutavalli and other members of his family, as he found that the Mussalman Wakf Act had not been enforced and remained a dead-letter in his district.

In a petition to revise such an order, *held;* that there was no provision made in the Act for any exercise of the powers by the Court of its own accord and that hence the District Judge had no jurisdiction to pass such an order.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Salem, dated 12th September, 1944, and made in the matter of Wakf, Paramathi, Namakkal Taluk.

S. S. Ramachandra Aiyar for Petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—This petition is to revise an order of the District Judge of Salem dated 12th September, 1944. By that order the District Judge, purporting to act under the Mussalman Wakf Act, 1923, called upon the mutavalli of a wakf at Paramathi, Namakkal Taluk, to file certain statements regarding the finances of the trust, including a statement of the portion of the annual income beneficially taken by the mutavalli and other members of his family.

The mutavalli petitioned in revision and Mockett, J., made an order requesting the District Judge to furnish a report of the circumstances in which he had come to make his order. He pointed out that it was not clear how such an order could be made in the absence of any application therefor. The report was to state how the matter first arose, whether notice was sent to anyone, and generally under what provisions of law the Court claimed to have jurisdiction. The attention of the learned District Judge was directed to the case of *Nasrullah Khan* v. *Wajid Ali*[1].

The District Judge has duly submitted his report. In this he states that he found that the Mussalman Wakf Act had not been enforced and had remained a dead letter, in his opinion, so far as his district was concerned. He, therefore, in December 1942, thought it necessary to take action in order that the provisions of section 3 of the Act should be fulfilled. That section imposed an obligation upon every mutavalli to furnish particulars to the Court relating to his wakf. The District Judge says that it was in such circumstances, namely, that the section had never been observed, he issued this order calling for the information.

The Act is a short one. Section 2 contains definitions, amongst other things, of a wakf. This is defined as the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable, but does not include any wakf under which any benefit is for the time being claimable for himself by the person by whom the wakf was created or by any of his family or descendants. *Prima facie,* therefore, there would appear to be some doubt whether the Act applied at all to this wakf because the learned Judge, by his own order recognised that a portion of the income is beneficially taken up by the mutavalli and other members of his family. Moreover, in his report he refers to *Arumugha Pillai* v. *Kashi Mohiuddin Sheriff Sahib*[2], in which it was clearly found that in this wakf "the profits accruing from the suit property after meeting the expenses of the services were being enjoyed by the trustees and that they have therefore a beneficial interest in the property." See the judgment of Madhavan Nair, J., as he then was, at page 536.

* C. R. P. No. 392 of 1945. 9th August, 1945.

1. (1929) I.L.R. 52 All. 167.
2. (1933) 64 M.L.J. 706 : A.I.R. 1933 Mad. 533.

Even if the Act were to be held to apply in that this wakf came within the definition of section 2, yet in my opinion there is no jurisdiction conferred upon the District Judge to do anything in the nature of what he has done. Section 3, as stated, imposes an obligation to furnish particulars upon the mutavalli within six months from the commencement of the Act, and prescribes the particulars which are to be furnished. Section 4 provides that when such particulars have been given they are to be made public. Thereafter, any person may apply to the Court by a petition in writing for the issue of an order requiring the mutavalli to furnish further particulars or documents. Then, on such application being made, the Court may cause to be served on the mutawalli an order requiring him to furnish such particulars. Sections 5 and 6 deal with the filing and auditing of accounts. Sections 7, 8 and 9 relate to the cost of preparation of the above statements, to their verification and to the preparation of copies. Under section 10 penalties are prescribed for failure to comply with the requirements of sections 3, 4 and 5. It provides that any person who is required under sections 3, 4 or 5 to furnish statements or accounts shall, in default, be liable to a fine.

There is no provision made for any exercise of powers by the Court of its own accord. Perhaps this is a defect in the Act which, as pointed out in *Nasrullah Khan* v. *Wajid Ali*[1] may have unfortunate consequences. In that case a Bench of two Judges both of whom were Muhammadans, held that the District Judge had no authority to pass an order that the mutavalli should file a statement of accounts as contemplated by section 5. The only power that the District Judge had was to impose a fine upon him for not filing it. He cannot do even this unless some complaint is made to him by a person who is sufficiently interested or public spirited to do so.

In short, while the zeal of the learned District Judge to ensure the efficient working of the Act is most commendable, in my opinion, he had no power whatever to make the order which he did. This petition is therefore allowed. There is no contending party and I make no order as to costs.

V.P.S. *Revision allowed.*

[THE FEDERAL COURT OF INDIA.]

(On appeal from the High Court of Judicature at Lahore.)*

PRESENT:—SIR PATRICK SPENS, *Chief Justice*, SIR S. VARADACHARIAR AND SIR MUHAMMAD ZAFRULLAH KHAN, JJ.

The Secretary of State for India ... *Appellant*†

v.

I. M. Lall .. *Respondent.*

Government of India Act (1935), section 240 (1) and (3) and Civil Services (Classification, Control and Appeal) Rules—Rule 55—Dismissal of member of the Indian Civil Service—Secretary of State for India, if a competent authority—Scope of the power of dismissal—Limitations on such power—Remedy of the dismissed servant—Proper relief—Construction of section 240 (1) and (3)—Amendment—Mistake as to proper remedy—Granting of leave.

L was appointed to the Indian Civil Service in 1922. In September 1937, he was informed that the Punjab Government had decided to hold a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules, into his conduct whilst he was serving in Multan during 1935-36 and that eight charges had been framed against him of which copies were enclosed. He was asked to furnish a written statement of his defence. On the 9th of January, 1938, he filed his written statement. An officer *S* was appointed to hold the departmental enquiry who after making an enquiry submitted his report to the Government on the 9th of August, 1938. This report was not disclosed to *L*, in spite of his repeated requests for a copy of it. On the 14th of November, 1938, the Government informed *L*, that *S*, who had held the preliminary enquiry was unable to complete it and that its completion had been entrusted to another officer *B*. *B* informed *L* of this and asked the latter to arrange to meet him on a later date when all the available materials would be gone into. *L* took up the position that the enquiry against him was over and that if it was said to be incomplete, he might be given a copy of the report of *S* and the order of the Government thereon. The Government refused to give either and persisted in that attitude to the very end. Then *L* met *B* and after protesting that he was not being given adequate opportunity of defending himself as provided by

1. (1929) I.L.R. 52 All. 167.

* A.I.R. 1944 Lah. 240.
† C. A. No. 12 of 1944. 4th May, 1945.

rule 55 of the Civil Service Regulations, completed what he had to say in his defence by the 2nd January, 1939. *S* made his report on the 29th January, 1939, which was sent on the 21st June, 1939, to the Federal Public Service Commission together with some findings and recommendations of the Punjab Government thereon for their consideration. On the 31st August, 1939, the Punjab Government was informed that the Commission concurred in the views of that Government that *L* was unfit to be retained in the I.C.S. and that he be removed from service. On the 10th August, 1940, *L's* removal from the I.C.S., was notified in the Gazette with effect from 4th June, 1940. *L* was informed of his removal and given a copy of the letter of the 31st August, 1939. After carrying on some correspondence with the Government in seeking to get redress, *L* finally filed a suit on the 20th July, 1942, for a declaration that the order of his removal from the I.C.S. was not passed in due course of law and was wrongful, illegal and *ultra vires* of the Government.

Held. (Varadachariar, J., dissenting) that *L* was wrongfully dismissed from the Indian Civil Service.

Per *Spens, C.J.* (*Zafrullah Khan, J.*, concurring).—The power of the Secretary of State to dismiss, after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service, who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act itself. Even otherwise an exercise of the power of dismissal from one of His Majesty's Services by the principal Secretary of State concerned is the proper constitutional manner in which the power of the Crown should be exercised.

The general rule of law is that except as otherwise provided by statute, servants of the Crown hold their appointments at the pleasure of the Crown. Where in the case of any particular servants of the Crown, statutory limitations or qualifications on the right of dismissal are found in statutes in which the general rule is not expressly enacted but left to have operation, if at all, only by implication, it is possible for Courts to hold that those limitations and qualifications are mandatory and effective and breach of them gives rise to a cause of action. On the other hand where such limitations or qualifications are found only in rules made under a statute, which whilst expressly enacting that servants of the Crown hold office during His Majesty's pleasure also provides that such tenure is subject to the provisions of the rules made thereunder, none the less, breach of the provisions of such rule may afford no cause of action at all. Again it may also well be that any limitation or qualification on the power of the Crown to dismiss its servants at will attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that servant is not legally enforceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement.

There is no reason to confine the construction of the opening words of section 240 of the Constitution Act "Except as expressly provided by this Act" to provisions of the Act outside section 240 itself. The words are apt enough to include a limitation or qualification on what follows in sub-section (1) by provisions found later on in the same section.

It is not possible to construe sub-section (3) of section 240 of the Act so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable.

The words "against the action proposed to be taken in regard to him" in sub-section (3) of section 240 of the Act require that there should be a definite proposal by some authority either to dismiss a Civil Servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon. The sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank a member of the Civil Service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity it follows that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. Hence it can be regarded as a provision in the Constitution Act which while it does not alter the tenure of office during His Majesty's pleasure prescribed by sub-section (1) of section 240, or the power of dismissal at will, does impose in certain cases certain statutory obligations to be carried out before dismissal is effected, breach of which will give to the person adversely affected a cause of action. In the circumstances of this case, the early notice contained in the charge-sheet that possibly dismissal might be decided upon is not adequate compliance, with sub-section (3) of section 240 of the Act. No opportunity to show cause against dismissal was given to *L* after dismissal had passed from being a possible punishment to the punishment proposed and recommended. The wording of sub-section (3) requires something which was not done in this case.

The proper remedy of *L* is damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240. He is not entitled to a declaration that he has never been dismissed or that he still remains a member of the service.

As everyone proceeded on the wrong footing that the proper remedy of *L* would be a declaration that his dismissal was a nullity and no claim for damages was made, in the circumstances of its being an exceptional case where everyone mistook the proper remedy, leave to amend to claim damages should be given.

Per *Varadachariar, J.*—The Secretary of State had authority to remove *L* from the Indian Civil Service.

A comparison of clause (3) of section 240 with rule 55 of the Civil Service Regulations will show that (subject to certain differences of wording) the general principle of notice and opportunity for

defence as well as the exceptions to its application have been incorporated in the statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules. This new method of providing the safeguard for the services will certainly have one important consequence, namely, that it will place it beyond the power of the rule-making authority to deprive the services, by any change in the rules of the benefit of the general principle of notice and opportunity for defence. It may also have another result, namely, that the dismissal of an officer without giving such opportunity may entitle him to seek redress in a Court of law. A provision like clause (3) made in the statute itself may with greater force be claimed to be a qualification of or even a part of the declaration contained in clause (1) of the same section as to the nature of the tenure.

There is nothing in the language of clause (3) to suggest that a further opportunity was to be given after the enquiry had been completed in the presence of the officer charged and the enquiring officer had made his report. If such an additional step had been intended, such intention would have been more clearly indicated.

The Court has no right to examine the correctness of the inferences drawn or conclusions reached by the enquiring officer or by the responsible authorities.

The circumstances of the case do not individually or collectively warrant the conclusion that *L* has not had a reasonable opportunity of showing cause against the charges during the time of *B's* enquiry.

N. P. Engineer, Advocate-General of India (*S. M. Sikri*, Advocate, Federal Court with him) instructed by *K. Y. Bhandarkar*, Agent for Appellant.

Respondent in person, instructed by *Naunit Lal*, Agent.

The Court delivered the following Judgments :—

Spens, C. J. (*Zafrullah Khan, J.*, concurring).—This is an appeal by the Secretary of State for India in a suit instituted by the respondent, Mr. I. M. Lall, who was a senior member of the Indian Civil Service in the year 1940, when the Secretary of State for India purported to remove him from the service. Mr. Lall's suit was originally commenced in the Court of the Sub-Judge, First Class, Lahore. It was later transferred to the High Court for hearing and was finally heard by a Division Bench of the High Court (Abdul Rashid and Ram Lall, JJ.).* On the 27th March, 1944, the High Court made a decree in Mr. Lall's favour declaring that the order made in the year 1940 for the removal of Mr. Lall from the Indian Civil Service with effect from the 4th June, 1940, was wrongful, void, illegal and inoperative, and that Mr. Lall was still a member of the Indian Civil Service. At the time the learned Judges made this order, they added a note to their judgment that several substantial questions of law as to the interpretation of the Government of India Act, 1935, were involved in the case, and they accordingly certified that it was a fit case for appeal to the Federal Court. Hence this appeal. It was suggested by Mr. Lall that the above certificate was not in proper form to comply with section 205 of the Constitution Act, 1935. We were wholly unable to accept any such contention. The intention of the learned Judges is quite plain. No particular form of certificate is required.

The material facts can be summarised as follows :

Mr. Lall was appointed to the Indian Civil Service in the year 1922, and on the 1st September, in that year entered into a covenant with the Secretary of State in Council. The covenant recited that the Secretary of State in Council had appointed Mr. Lall

"to serve His Majesty as a member of the Civil Service of India . . . . . such service to continue during the pleasure of His Majesty, his heirs and successors, to be signified under the hand of the Secretary of State for India . . . . ."

In the year 1935, Mr. Lall was stationed in Hoshiarpur. While there he enlisted one Sundar Das, a nephew of his wife, in the subordinate staff of one of the Courts under his control. Shortly thereafter Mr. Lall took over charge as District and Sessions Judge at Multan. In June 1935, two applications were received from Sundar Das for the transfer of Sundar Das to Multan. In August 1935, Mr. Lall appointed Sundar Das as Ahlmad to one of the Sub-Judges under him, in an officiating arrangement. In April 1936, Mr. Lall went on leave to England and whilst he was on leave Sundar Das was reverted to unemployment. On the 22nd October, 1936, Mr. Lall resumed charge as District and Sessions Judge, Multan, and on the

* A.I.R. 1944 Lah. 240.

29th October, 1936, Mr. Lall signed a proposal for Sundar Das to be appointed Ahlmad at the Sub-Judge's Court, Leiah. On the 23rd December, 1936, Mr. Lall approved a further proposal put up by the Clerk of his Court for the confirmation of Sundar Das in place of an official who had retired. This order would have had the effect of promoting Sundar Das over the heads of a number of subordinate officials senior to him. Several of the persons affected took steps to petition against this order. Subsequently on or before the 20th March, 1937, the Clerk of Court put up to Mr. Lall a note explaining that a mistake had been made and that the vacancy in which Sundar Das had been appointed actually did not exist and suggested the cancellation of the order of the 23rd December, 1936. On the 22nd March, 1937, Mr. Lall cancelled his order of the 23rd December, 1936, but simultaneously confirmed a series of proposals including the confirmation of Sundar Das as a paid candidate. Early in April, 1937, Mr. Lall was transferred to be employed in the North-West Frontier Province. Before going however he passed a number of orders affecting some of the junior officials who had protested against the order of the 23rd December, 1936. By an order of the 4th March, 1937, he directed the posting of one of them to Alipore, alleged to be a particularly unpleasant station. By one of the orders made on the 22nd March, 1937, he confirmed a proposal by the Clerk of Court to transfer two other of such persons from headquarters at Multan to Muzaffargarh and Khanewal as a disciplinary measure. By another order he reduced one of these one place in seniority and before he left Multan he recorded adverse remarks in the service books of four of the persons who had protested.

In September, 1937, whilst Mr. Lall was serving in the North-West Frontier Province, he received a letter from the Judicial Commissioner, enclosing a letter, dated the 2nd September, 1937, from the Chief Secretary to N.-W. F.P. Government, informing the Judicial Commissioner, that the Punjab Government had decided to hold a departmental enquiry under rule 55 of the Civil Services (Classification, Control and Appeal) Rules into the conduct of Mr. Lall whilst stationed at Multan during 1935-36, and that eight charges had been framed against Mr. Lall of which copies were enclosed. The letter proceeded to ask that steps should be taken to serve the charges on Mr. Lall and that Mr. Lall should be asked to furnish within a reasonable time a written statement of his defence and to state whether he wished to be heard in person or not. The eight charges enclosed were divided into two categories. The first category alleged improper favouritism or nepotism in connection with Mr. Lall's dealings with Sundar Das; the second alleged improper victimization of certain of the junior officials who had protested against the attempted promotion of Sundar Das by the order of December, 1936. At the end of each charge was indicated the witnesses or documents whereby it was proposed to attempt to prove the charge. Interposed between the last charge (that dealing with the adverse entries in the service books) and the indication of the evidence by which that charge was proposed to be proved, there were two paragraphs to the following effect:—

"That the above facts and his failure to offer any sufficient explanation up to the present are sufficient to prove that he had abused his position as an officer entrusted with the power of appointment on behalf of the Crown to show favour to a relation of his to the detriment of other officials serving under him, in contravention both of the recognised principles governing the conduct of Government servants as well as of the express orders of Government, and that he further abused his position as an officer entrusted with powers of discipline over other officers of the Crown to persecute various persons who sought to protect their own interests in a legitimate manner.

That he should show cause why he should not be dismissed, removed or reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce for breach of Government rules and conduct unbecoming to a member of the Indian Civil Service."

After obtaining copies of the documents referred to, Mr. Lall in due course, namely, on the 9th January, 1938, put in his written statement in answer to the charges. At the same time he asked for certain other documents and stated:

"I wish to be heard in person. My position in this matter is that there is no necessity of an oral enquiry. All my orders are in writing. The material sought to be used against me are also in writing. On these materials the Government can give their decision."

Shortly thereafter, Mr. J. D. Anderson, Commissioner, Rawalpindi Division, was appointed to hold the departmental enquiry and on the 10th June, 1938, Mr. Anderson examined Mr. Lall on the eight charges, which examination Mr. Anderson reduced into writing on the 11th June, 1938. In that statement Mr. Lall dealt with each charge at considerable length. Having recorded Mr. Lall's statement, Mr. Anderson considered it necessary to record a statement by Lala Chaman Lal, the Clerk of Court in Mr. Lall's Sessions Court at Multan. Lala Chaman Lal was duly examined in the presence of Mr. Lall who was permitted to ask whatever questions he desired and his statement was recorded on the 30th July, 1938. Mr. Anderson did not examine any other witnesses, nor did Mr. Lall apply for leave to examine any other witnesses. On the 9th August, 1938, Mr. Anderson made his report. Mr. Anderson pointed out that Mr. Lall pleaded guilty to the first two charges dealing with the enlistment and transfer to Multan of Sundar Das and to the signing of the order of the 23rd December, 1936. The remaining charges, Mr. Anderson found, on the evidence before him, were unproven. He went on however to indicate that he had not been able to make a full enquiry and that a longer investigation including a fortnight at Multan was desirable before coming to final conclusions. He indicated the desirability of numbers of other documents being examined in order to compare what Mr. Lall had done in other cases with what he had done in the cases which were the subject-matter of the charges. He finally suggested three courses to Government: (1) that orders should be passed on those charges only to which Mr. Lall had pleaded guilty leaving the question of his guilt on the other charges undecided; (2) to hold that as the Clerk of Court was clearly not speaking the whole truth Mr. Lall's word should be accepted and the last six charges should be taken as breaking down for lack of proof; and (3) that anything Mr. Anderson had done should be regarded as a preliminary enquiry only and that some other officer should be appointed to make a complete investigation. Mr. Anderson proceeded to express his view that the third was the proper course. He moreover indicated, in the concluding paragraphs of his report, the further documents and matters which he would wish to look into before coming to final conclusions.

The Government did not disclose Mr. Anderson's report to Mr. Lall but proceeded to adopt Mr. Anderson's third suggestion and appointed Mr. F. L. Brayne (Commissioner, Rural Reconstruction, Punjab) to complete Mr. Anderson's preliminary enquiry. On the 14th November, 1938, Mr. Lall was informed by a letter from the Chief Secretary to Government, Punjab, that Mr. Anderson had been unable to complete the enquiry against him and that its completion had been entrusted to Mr. Brayne. On the 17th November, 1938, Mr. Brayne wrote to Mr. Lall giving him the same information and informing him that the enquiry would have to be completed or at least part of it in Multan, and asking Mr. Lall to let him know the earliest date on which he could meet Mr. Brayne there. Mr. Brayne concluded by saying that he did not expect that it would take more than at most one or two days. Mr. Lall immediately took up the position that he did not understand what was happening, that he understood Mr. Anderson had completed the enquiry, and asked the Chief Secretary that he might be supplied with a copy of the report of Mr. Anderson or at least the portion of it in which it was said that his enquiry was incomplete and that he might be given a copy of the order of the Punjab Government on the report. The Government refused to give Mr. Lall any further information on the position. Mr. Lall had meantime returned from duty in the North-West Frontier Province and had been posted as Additional District and Sessions Judge, Lyallpur, and had to undertake a tour arranged before his return. He accordingly asked by a letter addressed to Mr. Brayne on the 24th November, 1938, that he might not be called to attend the enquiry until after Christmas. Mr. Brayne replied that his engagements prevented him dealing with the enquiry during the first half of January and suggested that Mr. Lall should meet him at Multan on the morning of Saturday, the 10th December, and expressed the view

that he could finish everything before the mail train left on Sunday afternoon for Lahore. He subsequently by letter and telegram asked Mr. Lall to meet him on the 9th instead of on the 10th as he desired to catch the mail train to Lahore on Saturday, the 10th.

Meantime by a letter of the 29th November, 1938, Mr. Brayne informed him that at Multan he proposed to examine various other documents and purported to indicate the classes of documents which he proposed to examine at Multan and the reasons why he was proposing to examine them. To any one who had read Mr. Anderson's report this letter of Mr. Brayne would clearly have indicated what Mr. Brayne was proposing to do and why. Mr. Lall had however been refused a sight of Mr. Anderson's report. Whilst before us it was submitted on behalf of the appellant that this letter adequately apprised Mr. Lall of what was in Mr. Brayne's mind, Mr. Lall at the time took up the position, and has since maintained, that it only added to his confused state of mind. On the 9th December, 1938, Mr. Lall met Mr. Brayne at Multan. Certain of those further documents which had been collected were shown to Mr. Lall, but Mr. Lall insisted that he did not understand his position and that he considered that Mr. Anderson's enquiry had been completed, and he asked for adequate time to understand his position. In these circumstances the interview was a short one and it was arranged that Mr. Lall should put his representations in writing as regards the procedure by the 19th December, and that there should be a further meeting on the 20th December at Lahore and meantime copies of the relevant parts of the new documents should be sent to him. Accordingly on the 11th December, 1938, Mr. Brayne sent to Mr. Lall a large number of copies of the relevant parts of the new papers and in addition a list of 42 character rolls in which entries had been made by Mr. Lall in 1936 or 1937. Mr. Lall was informed that if he wished to see the originals on the 20th, he could do so if he gave sufficient notice.

On the 15th December, Mr. Lall acknowledged receipt of the documents and asked for certain other documents to be produced at the meeting of the 20th. On the 18th December, Mr. Lall duly enclosed to Mr. Brayne his submissions in writing in regard to Mr. Brayne's enquiry. In his submission Mr. Lall again made it abundantly clear that he did not understand what was happening; that he did not understand what the further documents were for or how, or in respect of what charges, they were relevant, and that none of them were mentioned in the charge sheet. In these circumstances Mr. Lall again met Mr. Brayne at Lahore on the 20th. This interview admittedly lasted a considerable time, and according to Mr. Brayne's note, made at the time and subsequently explicitly confirmed in his evidence given later at the hearing of the case in the High Court, Mr. Brayne explained the relevancy of the new documents to Mr. Lall and the reasons for which he was looking at them. Mr. Lall persisted that unless he was given a copy of Mr. Anderson's report and the Government orders thereon, he was not being given adequate opportunity of defending himself as provided by rule 55. He asked for certain other documents and according to Mr. Brayne he then addressed him about the case. He was further permitted to put in a further memorandum on the case by the 26th December. On the 26th December, Mr. Lall forwarded to Mr. Brayne this further memorandum. Neither the original nor a copy of this document has been produced in the course of the proceedings. On the 30th December, the parties again met but this written document, having been sent to Mr. Brayne in camp, had not reached him. Mr. Lall expressed the desire to address Mr. Brayne again personally after he had read Mr. Lall's written representations and the 2nd January was fixed for this purpose. Accordingly on the 2nd January, 1939, Mr. Brayne saw Mr. Lall again, and according to Mr. Brayne, Mr. Lall completed all that he desired to say to him on the case. On the 24th January, 1939, Mr. Brayne made his report.

In his report Mr. Brayne was not content with merely accepting Mr. Lall's plea of guilty to the charges of nepotism, but went into the details and surrounding

circumstances at great length and found that the nepotism was "complete and deliberate." As regards the charges of vindictiveness, Mr. Brayne again went into all the details and the surrounding circumstances and found that these charges were all fully proved.

This report was sent on the 21st June, 1939, to the Federal Public Service Commission, together with some finding and recommendations of the Punjab Government thereon, for their consideration, and by a letter, dated the 31st August, 1939, from the Secretary of the Federal Public Service Commission to the Secretary to the Government of India, Home Department, the Commission expressed their concurrence in the views of the Punjab Government that Mr. Lall was unfit to be retained in the Indian Civil Service and recommended that he be removed from service under Article 353 of the Civil Service Regulations, but that in view of his seventeen years' service he should be granted the full compassionate allowance permissible under that Article.

From this it is clear that by the 31st August, 1939, there were definite proposals or recommendations of the Punjab Government, concurred in by the Federal Public Service Commission, that Mr. Lall should be removed from the service on the grounds and for the reasons set out in Mr. Brayne's report.

In the Gazette of the 10th August, 1940, there appeared a notification, over the signature of the Chief Secretary, Punjab Government, to the effect that:

"His Majesty's Secretary of State for India has directed the removal of Mr. I. M. Lall from the Indian Civil Service with effect from the 4th June, 1940."

By letter dated the 10th August, 1940, Mr. Lall was informed by the Punjab Government of his removal and was given a copy of the letter of the 31st August, 1939, above referred to, from the Federal Public Service Commission.

Meantime after the date of Mr. Brayne's report Mr. Lall remained energetic in his attempts to secure copies of the reports of Mr. Anderson and Mr. Brayne and therewith to make personal representations to the authorities. In June 1939, in particular, he pressed for an interview with His Excellency the Governor of the Punjab and on the 16th June repeated his request for copies of the report. This interview was not granted on the ground mainly that his case had passed to higher authority. Whereupon on the 23rd June, 1939, Mr. Lall requested that if the authority to decide his case were the Secretary of State, he might be permitted to place his side of the case before the Secretary of State in person and that he might be granted facilities for that purpose. On the 26th June, 1939, he was told that if he had representations to make they could be addressed to the Governor-General in the form of a memorial under the rules relating to the submission of memorials.

In the spring of 1940, Mr. Lall proceeded to London where he appears to have tried to make representations in person at the India Office.

Whatever representations were made it is clear that at no time before his removal from the service was Mr. Lall allowed to see the reports of either Mr. Anderson or Mr Brayne, nor was he informed that either the Punjab Government or the Federal Public Service Commission or the Government of India or the Secretary of State were definitely proposing on the basis of those reports to remove him from the service. He had received the general invitation to show cause against possible dismissal (amongst other possible punishments) included at the end of the charges originally served on him. But no opportunity to show cause against dismissal was given to him, after dismissal had passed from being a possible punishment to the punishment proposed and recommended. At no time was he given an opportunity, before dismissal, of making representations against the accuracy of facts found by Mr. Anderson or Mr. Brayne in their reports or against the adverse deductions drawn against him, particularly by Mr. Brayne.

After Mr. Lall had been notified of his removal, he proceeded to enquire as to the authority under which the Secretary of State had purported to order his removal. In a letter from the Department of the Chief Secretary to the Punjab Government, he was informed on the 19th March, 1941, that the Secretary of State

had not disclosed the authority under which he was acting, but the attention of Mr. Lall was drawn to rule 50 of the Civil Services (Classification, Control and Appeal) Rules read in conjunction with sub-section (2) of section 240 of the Government of India Act.

Mr. Lall was not satisfied with this reply and made enquiries of the Secretary of State himself. By letter dated the 6th October, 1941, Mr. Lall was informed through the Punjab Government that in removing him from the Indian Civil Service,

"the Secretary of State acted on behalf of His Majesty in exercise of the rights of the Crown to dismiss its servants at pleasure."

On the 20th July, 1942, Mr. Lall filed his suit asking for a declaration that the order of removal of the plaintiff from the Indian Civil Service was not passed in due course of law and was wrongful, illegal and *ultra vires* of the defendant and that Mr. Lall was still a member of the Indian Civil Service and for other relief.

Before the case had been transferred to the High Court the Sub-Judge had settled a preliminary issue as follows:

"Whether the Secretary of State had authority to remove the plaintiff from the Indian Civil Service, even if the enquiries were illegal or *ultra vires*."

After the case had been transferred to the High Court, the learned Judges in addition to the preliminary issue, framed a number of further issues including the following:

1. Did the Secretary of State have authority to remove the plaintiff from the Indian Civil Service?

2. Was it incumbent on the defendant to hold an enquiry before making an order removing the plaintiff from service?

3. If so what should be the nature of such enquiry?

4. Was not the plaintiff given adequate opportunity of defending himself as contemplated in rule 55 of the Civil Services (Classification, Control and Appeal) Rules? If not, what is the effect?

5. Was not the plaintiff given reasonable opportunity of showing cause as laid down in section 240 (3) of the Government of India Act, 1935? If not, what is the effect?

6. Is the Court entitled to determine the question whether the opportunity given was reasonable or not?

8. Did not Mr. Brayne conduct the enquiry *bona fide*? If not, what is the effect?

On the preliminary issue the learned Judges came to the conclusion that the plaintiff could not be removed from office until he had been given a reasonable opportunity of showing case. This determination also governed their decision on Issue No. 2. On Issue No. 1 the decision was that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service. As regards Issue No. 3, the learned Judges decided that the legal obligation would be adequately complied with provided that the person concerned knew all the charges against him, and an enquiry was held in such a manner that he had reasonable opportunity to defend himself and was not prejudiced or misled in the matter of his defence. Issues Nos. 4 and 5 were thereupon dealt with together on the basis that rule 55 and sub-section (3) of section 240 required a like compliance with the legal obligation as above set out and that what would be a breach of one would be a breach of the other, and after an exhaustive examination of exactly what happened in Mr. Lall's case, the learned Judges came to the conclusion that on the facts of the case the enquiry had not been conducted by Mr. Brayne in accordance with what appeared to them to be the legal requirements above set out. On Issue No. 8, the learned Judges accordingly found that as Mr. Brayne had not conducted the enquiry, in their view, in accordance with such legal requirements, the conduct of the enquiry could not be regarded as *bona fide*. On Issue No. 6, the learned Judges held that it was for the Court to determine whether the opportunity given was reasonable or not. In the result they decided in favour of Mr. Lall and made a declaration that the order of the removal of the plaintiff was wrongful, void, illegal and inoperative and that he still remained a member of the Indian Civil Service.

Before us, all the issues have been fully recanvassed by the Advocate-General of India and by Mr. Lall appearing in person.

The first matter to be discussed is the question whether under the Constitution Act of 1935 the Secretary of State for India has authority to remove a member of the Indian Civil Service from the service. If of course as Mr. Lall has strenuously urged no member can under any circumstances be removed by an order of the Secretary of State, it would be unnecessary to discuss any of the other issues in the case. Mr. Lall endeavoured to put before us a detailed historical account indicating that from at least the year 1833 onwards there was always an express statutory provision prescribing the authority and manner in which an officer of the East India Company and subsequently an officer serving His Majesty in India could and should be dismissed. He submitted that throughout, whatever authority subordinate to His Majesty was given a statutory power of dismissal, there was always also an overriding power in His Majesty himself to dismiss. He argued that when on the coming into operation of Part III of the Constitution Act of 1935, the Secretary of State in Council together with all his powers came to an end, all powers formerly exercisable by him were by virtue of section 2 of the Constitution Act, 1935, vested in His Majesty, and that as under the Constitution Act there was no express delegation of such power to the Secretary of State and no express directions by His Majesty under sub-section (1) of section 2 as to the manner in which those powers were to be exercised by anyone on behalf of His Majesty, it followed that it was only His Majesty himself who could dismiss a member of the Indian Civil Service under the present circumstances. Even if it be open to Mr. Lall, having regard to the terms of his Covenant of 1st September, 1922, to question a signification of His Majesty's pleasure by the Secretary of State, which may well be doubted, we are unable to accept Mr. Lall's arguments.

In our judgment the power of the Secretary of State to dismiss, after the coming into operation of the Constitution Act of 1935, members of the Indian Civil Service who were appointed by the Secretary of State in Council prior to the commencement of Part III of the Act, is implied in the Constitution Act itself. Section 244 (1) provides that as from the commencement of Part III of the Act appointments to the Indian Civil Service shall be made by the Secretary of State. Section 321 (*b*) provides that the repeal of the 1919 Act, shall not affect any appointment to any office made under it and that any such appointment shall have effect as if it were an appointment to the corresponding office under the 1935 Act. Mr. Lall must accordingly as from the 1st April, 1937, be regarded as if he had been appointed to the Indian Civil Service by the Secretary of State. Sub-section (2) of section 240 provides that no person who is a member of the Civil Service of the Crown in India shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed. There would here seem to be a clear implication that the authority who has been given the statutory power of appointment has the power to dismiss. This result can also be obtained from the implication which would arise from the general common law rule, that a power to appoint carries with it, in the absence of any other provision, a power to dismiss. On these grounds in our opinion there can be no reasonable doubt that from the Constitution Act itself can be found the requisite power in the Secretary of State in the year 1940 to dismiss Mr. Lall from the Indian Civil Service.

Moreover, if contrary to our views there be any difficulty in construing the Constitution Act so as to find therein the requisite power for the Secretary of State to dismiss a member of the Indian Civil Service, there would still in our judgment be no difficulty in holding that an exercise of the power of dismissal from one of His Majesty's services by the principal Secretary of State concerned was the proper constitutional manner in which the power of the Crown should be exercised. It is surely hardly necessary in this 20th Century to require authority for the practice that the executive powers of the Crown can (unless by statute or law otherwise provided) be exercised by or through the Minister responsible to Parliament for the exercise of those powers. Reference may however be made to Halsbury, Vol. VI, at para 760 :

"The exercise of the executive powers vested in the Sovereign is delegated in practice to the various political officers who compose the Ministry or Government, certain of whom are the heads of the principal government offices or departments of State and to government offices having no political heads, and whose staff is composed of permanent members of the Civil Service."

Mr. Lall does not contest this constitutional doctrine as regards executive actions so far as English law is concerned. But he seeks to establish a difference in regard to the exercise of the executive functions of the Crown in British India. We are unable to accept any such distinction and are of opinion that if there was nothing in the Constitution Act indicating a power in the Secretary of State to dismiss members of the Indian Civil Service, the Secretary of State would nonetheless be a Minister with the constitutional right to exercise the power of dismissal on behalf of the Crown. In our judgment when the Secretary of State in June, 1940, authorised the removal of Mr. Lall he was properly purporting to act on behalf of His Majesty in exercise of the right of the Crown to dismiss its servants.

The next and the really important and difficult question in this case is whether there was any legal limitation or restriction enforceable by action on the power of the Crown through the Secretary of State so to dismiss Mr. Lall, and if so, whether such limitation or restriction was or was not complied with in fact before the order for Mr. Lall's removal in June, 1940. The answer to this question involves the determination of the true construction of section 240 of the Constitution Act, which is as follows:

"(1) Except as expressly provided by this Act, every person who is a member of a civil service of the Crown in India, or holds any civil post under the Crown in India, holds office during His Majesty's pleasure.

(2) No such person as aforesaid shall be dismissed from the service of His Majesty by any authority subordinate to that by which he was appointed.

(3) No such person as aforesaid shall be dismissed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him:

Provided that this sub-section shall not apply—

(a) where a person is dismissed or reduced in rank on the ground of conduct which has led to his conviction on a criminal charge; or

(b) where an authority empowered to dismiss a person or reduce him in rank is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to give to that person an opportunity for showing cause.

(4) Notwithstanding that a person holding a civil post under the Crown in India holds office during His Majesty's pleasure, any contract under which a person, not being a member of a civil service of the Crown in India, is appointed under this Act to hold such a post may, if the Governor-General, or, as the case may be, the Governor, deems it necessary in order to secure the services of a person having special qualifications, provide for the payment to him of compensation, if before the expiration of an agreed period that post is abolished or he is, for reasons not connected with any misconduct on his part, required to vacate that post."

First, however, the legal position before the coming into operation of the Constitution Act requires to be considered. Section 96-B of the Government of India Act, 1919, provided (*inter alia*) (*a*) that subject to the provisions of that Act and all rules made thereunder, every person in the Indian Civil Service held office during His Majesty's pleasure, (*b*) that no such person might be dismissed by any authority subordinate to that by which he was appointed, and (*c*) that the Secretary of State in Council might (except so far as he might provide by rules to the contrary) re-instate any such person who had been dismissed.

Rules were made under this section. The relevant rules for this case are rules 50 and 55 of the Civil Services (Classification, Control and Appeal) Rules:

"R. 50. No member of an All-India Service, and no person holding the King's Commission on the active list of Regular Army, the Royal Air Force, the Royal Indian Navy or on the Super-numerary List of the Indian Army or appointed by the Secretary of State in Council shall be removed or dismissed except by order of the Secretary of State in Council."

"R. 55. Without prejudice to the provisions of the Public Servants Inquiries Act, 1850, no order of dismissal, removal or reduction shall be passed on a member of a service (other than an order based on facts which have led to his conviction in a criminal Court) unless he has been informed in writing of the grounds on which it is proposed to take action, and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the person charged to-

gether with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders on the case. He shall be required, within a reasonable time, to put in a written statement of his defence and to state whether he desires to be heard in person. If he so desires or if the authority concerned so direct an oral inquiry shall be held. At that inquiry oral evidence shall be heard as to such of the allegations as are not admitted, and the person charged shall be entitled to cross-examine the witnesses, to give evidence in person and to have such witnesses called, as he may wish, provided that the officer conducting the inquiry may, for special and sufficient reason to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and a statement of the findings and the grounds thereof.

This rule shall not apply where the person concerned has absconded, or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may, in exceptional cases, for special and sufficient reasons to be recorded in writing, be waived, where there is a difficulty in observing exactly the requirements of the rule and those requirements can be waived without injustice to the person charged."

These rules were in operation immediately prior to the coming into operation of Part III of the Government of India Act, 1935, and under section 276 of that Act would continue in force notwithstanding the repeal of the 1919 Act, if and in so far as the provisions of the rules were consistent with the Constitution Act, in which case they were to be deemed to be rules made under the appropriate provisions of the 1935 Act. It has been suggested before us that these rules did not continue in force, because their provisions are in fact inconsistent with the relevant provisions of the Constitution Act, or alternatively, that they could not have continued in force as they contained provisions which the rule-making authorities under the Constitution Act of 1935 could not have prescribed. The first suggestion depends upon the true construction of section 240 of the Constitution Act and whether or not the requirements prescribed by rule 55 are or are not consistent with the provisions of sub-section (3) of section 240. The second question would appear to depend on whether or not a power to make rules in respect of conditions of service includes a power to make rules in respect of conditions in regard to dismissal or removal from the service. In the view however which we take of section 240 it is wholly unnecessary to decide to what extent, if at all, rules 50 and 55 remain in force after the 1st April, 1937. In our view the question whether rule 55 was in force or whether or not it was in fact in this case complied with is not relevant, for even if it were in force and had not been complied with, it is in our judgment clear that failure to comply with such a rule could not give Mr. Lall any legal cause of action: See *Venkata Rao* v. *Secretary of State for India in Council*[1].

The question as to the meaning and effect of section 240 appears to us to require determination in the first instance quite irrespective of the possible continued existence of the previous rules. For it is only a breach of the statutory provisions of section 240 which can possibly afford Mr. Lall a good cause of action.

The first and chief difficulty of construing section 240 arises from the fact that in the same section it is expressly stated that except as provided by this Act every person who is a member of a Civil Service of the Crown in India "holds office during His Majesty's pleasure," and that provision is immediately followed by sub-sections (2) and (3), apparently limiting or qualifying the right of dismissal at will of such servants by the Crown.

The general rule of law is that except as otherwise provided by statute, servants of the Crown hold their appointments at the pleasure of the Crown. Where in the case of any particular servants of the Crown, statutory limitations or qualifications on the right of dismissal are found in statutes in which the general rule is not expressly enacted but left to have operation, if at all, only by implication, it has been possible for Courts to hold that those limitations and qualifications are mandatory and effective and breach of them gives rise to a cause of action: cf. *Gould* v. *Stuart*[2]. On the other hand where such limitations or qualifications are

1. (1937) 1 M.L.J. 529: L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532 (P.C.).
2. (1896) A.C. at p. 575.

found only in rules made under a statute, which whilst expressly enacting that servants of the Crown hold office during His Majesty's pleasure also provides that such tenure is subject to the provisions of rules made thereunder, none-the-less breach of the provisions of such rules may afford no cause of action at all: *cf.* section 96-B of the Government of India Act, 1919, and the Civil Services (Classification, Control and Appeal) Rules made thereunder and the decision in *Venkata Rao* v. *Secretary of State for India in Council*[1]. If in this case we had merely been dealing with a breach of rule 55, the decision in Venkata Rao's case would, as indicated earlier, have been decisive against any claim by Mr. Lall. Again it may also well be that any limitation or qualification on the power of the Crown to dismiss its servants at will, attempted to be imposed by contract or agreement between some authority purporting to contract on behalf of the Crown and that servant is not legally enforceable and will give to the servant no cause of action if in fact he be dismissed in breach of any such agreement: *Denning* v. *Secretary of State for India in Council*[2]. But the material provisions in this case are not left to be dealt with in rules, or in any agreement or contract. They are embodied in the very section itself.

Prior to the Constitution Act of 1935, it is true that Parliament had enacted in section 96-B of the Government of India Act, 1919, a statutory provision combining in the first sub-clause thereof (*a*) the provision that persons in the civil service of the Crown in India held office during His Majesty's pleasure subject to the provisions of the Act and of rules made thereunder with (*b*) the provision that no person in that service might be dismissed by any authority subordinate to that by which he was appointed. This last provision is reproduced in sub-section (2) of section 240 of the 1935 Act. But prior to the coming into force of the 1935 Act, no case had been based on these provisions in question in the 1919 Act. The only other previous enactment, to which our attention was drawn, in which there was combined an express statement that officers hold their appointment during pleasure with apparent limitations or qualifications on the right of dismissal at will was section 16 of the Commonwealth of Australia Defence Act 1903-1918 which provided that:

> "Officers shall hold their appointments during the pleasure of the Governor-General but the commission of an officer shall not be cancelled without the holder thereof being notified in writing of any complaint or charge made and of any action proposed to be taken against him nor without his being called upon to show cause in relation thereto."

This was the material section in *Cross* v. *The Commonwealth*[3]. There, on the claim of an officer for a declaration that his commission had not been validly cancelled and for arrears of pay or alternatively for damages for breach of the statutory duties imposed by section 16, Knox, C.J., having decided upon the facts that any such statutory duties had been duly performed and that the plaintiff's claim was in any event ill-founded in fact, went on to express the opinion that the provisions in section 16 which were introduced by the word "but" were directory only and did not constitute conditions precedent to the exercise by the Governor-General of the right of cancellation of a commission. This decision was referred to in the judgment of Latham, C.J., in *Fletcher* v. *Nott*[4] as an example of the complete maintenance of the old rule in the case of the Commonwealth Military Forces. He appears to have accepted the dictum of Knox, C.J., as right, but the remark of Latham, C.J., himself was made in the course of a judgment in a case wholly distinguishable on the facts both from *Cross' case*[3] and this case.

It is not surprising therefore that the Advocate-General of India argued that the express provision of sub-section (1) of section 240 clearly overrode any limitation or qualification imposed by sub-section (3) whilst as regards sub-section (2) he submitted that it was not really a limitation on the power to dismiss but merely a statutory direction as to the channel by which the Royal pleasure was to be executed. On that ground he accepted, as he was bound to, the decision of this Court

1. (1937) 1 M.L.J. 529: L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532 (P.C.).
2. 37 T.L.R. at p. 138.
3. 29 C.L.R. at page 219.
4. 60 C.L.R. at p. 68.

in *Suraj Narain Anand's case*[1]. But as regards sub-section (3), the learned Advocate-General argued that its provisions were very different in effect from those of sub-section (2) and that it should be construed as directory only in accordance with the *obiter dictum* of Knox, C.J., in *Cross' case*[2]. He supported this argument by submitting that the opening words of sub-section (1) " except as expressly provided by this Act " clearly did not apply to anything in section 240 itself but only to provisions, such as the tenure of office of Judges, to be found elsewhere in the Act outside section 240, and that the words " during His Majesty's pleasure " should therefore be construed as wholly unqualified in law by anything in the section itself. Alternatively, the learned Advocate-General argued that if any limitation or qualification enforceable by action were imposed by the provisions of sub-section (3) such limitation had on the facts of this case been fully complied with and that Mr. Lall had had all reasonable opportunity of showing cause. The learned Advocate-General finally submitted that it was in any event not for the Court but for some executive authority to decide whether or not Mr. Lall had had reasonable opportunity.

This last submission is the point raised by *Issue No.* 6 in the action and on that point we agree with the decision of the learned Judges of the High Court and for the reasons stated by them hold that it is not possible to construe sub-section (3) so as to exclude the jurisdiction of the Court to determine whether or not the opportunity to show cause has or has not been reasonable. In particular, we would call attention to the contrast in the wording of sub-clause (*b*) of the same sub-section where proper words appear to us to have been used to exclude the jurisdiction of the Court in the determination of the reasonable practicability of giving an opportunity to show cause. There the decision is clearly a matter for the authority empowered to dismiss. In the main portion of sub-section (3) there is no similar indication that the decision is only a matter for some executive authority.

Turning to the earlier submissions of the learned Advocate-General, we do not see any reason to confine the construction of the opening words of section 240 " except as expressly provided by this Act " to provisions of the Act outside section 240 itself. It is true that there are not also words in sub-section (1) such as " subject to the provisions of this section " as are found in sub-section (2) of section 241 and elsewhere in the Act, but the opening words used in sub-section (1) of section 240 appear to us as apt to include a limitation or qualification on what follows in sub-section (1) by provisions found later on in the same section as by provisions found elsewhere in the Act.

Next it must be remembered that an important reason in *Venkata Rao's case*[3] for the decision that the material provisions in the rules were directory only was the number and diversity of the rules and their liability to be changed from time to time. In sub-section (3) of section 240 there have been enacted provisions of very limited scope in permanent statutory form as compared with the provisions in the rules considered in *Venkata Rao's case*[3]. The difficulty which presented itself of allowing a cause of action to spring from one of many provisions contained in variable rules does not exist in this case. This case is in this respect perhaps nearer the case of *Cross* v. *The Commonwealth*[2]. But the opinion of Knox, C.J., quoted above, is *obiter*, and expressed in respect of a section of which we do not know the history in the same way as we know the history of sub-section (3) of section 240. We know that prior to 1935 the sort of protection for the servant of the Crown provided by sub-section (3) was merely to be found in rules, many and various and liable to change. From these rules have been picked out and enacted in the section itself certain limited specific provisions only. That course must have been adopted to strengthen the protection to be afforded to the Civil Servant. The Advocate-General agrees and submits that that factor is satisfied by this protection no longer being liable to alteration or diminution by merely changing a rule. Now

1. (1942) 2 M.L.J. 794 : (1941) F.C.R. 37 : (1942) 5 F.L.J. 99.
2. 29 C.L.R. at p. 219.
3. (1937) 1 M.L.J. 529 : L.R. 64 I.A. 55 : I.L.R. (1937) Mad. 532 (P.C.).

the protection, he urges, is guaranteed against change, except by an amending Act of Parliament. That is true so far as it goes. But are we to take it that that is all that Parliament intended? That though it has now embodied in the Act itself protection of very limited effect compared to the provisions of former rules, the provision is still to be a mere empty statutory and solemn assurance and that it cannot give rise to any cause of action to the unfortunate officer dismissed or reduced in rank in flagrant breach of it. This Court has already held in *Suraj Narain Anand's case*[1] that breach of sub-section (2) does give rise to a cause of action for a declaration that the dismissal is a nullity as having been given by one without authority to dismiss. It has been argued on behalf of Mr. Lall that equally under sub-section (3) the authority *prima facie* empowered to dismiss is not in a position to dismiss until the conditions of sub-section (3) have been complied with, and that any prior dismissal must be a nullity. It is this reasoning we gather that led the learned Judges in the High Court to make the declaration which they in fact made. In our judgment the distinction which the learned Advocate-General took between sub-section (2) and sub-section (3) is a good one. Under sub-section (2) no authority lower than the authority by which a civil servant was appointed has any power to execute the Crown's right of dismissal of that servant. Any purported dismissal by any such inferior authority is a mere nullity. On that view of sub-section (2) there is no real limitation on the power of the Crown to dismiss its servants at will, provided the order of dismissal is given by the prescribed authority. An order given by any other authority is ineffective. It is difficult to apply the same reasoning to sub-section (3). In the first place if no one is to have the power of dismissal until the conditions of sub-section (3) have been complied with, it would seem that there must be a clear contradiction between the provisions of sub-section (1) and sub-section (3). There would be periods, during which the conditions of sub-section (3) were being complied with, when some servants though holding office at the pleasure of the Crown and meriting instant dismissal could not in fact be dismissed at all by any one. Until the conditions of sub-section (3) were complied with, there would be no one authorised to exercise the power of dismissal. On the other hand the preferable construction may well be that the proper authority (in the case of civil servants such as Mr. Lall, namely, the Secretary of State) has at all times the legal power of dismissal at will. An order of dismissal by him is not an order from a person who has no legal power to dismiss. He can dismiss at any time, but it may be that if he in fact dismisses without the provision of sub-section (3) being complied with, he has acted wrongfully and the person affected may have a cause of action for wrongful dismissal. Whether this is so must depend upon the exact meaning and effect to be given to the words of sub-section (3). In support however of this view as to the nature of the cause of action arising from breach of such a provision, we would refer to the passage in *Venkata Rao's case*[2] where their Lordships of the Privy Council discuss the proper remedy.

We accordingly turn to the words of the main part of sub-section (3) of section 240 with a view to determining more exactly their meaning. In our judgment the words "against the action proposed to be taken in regard to him" require that there should be a definite proposal by some authority either to dismiss a civil servant or to reduce him in rank or alternatively to dismiss or reduce him in rank as and when final action may be determined upon. It should be noted that the sub-section does not require any inquiry, any formulation of charges, or any opportunity of defence against those charges. All that it expressly requires is that where it is proposed to dismiss or reduce in rank a civil servant he should be given reasonable opportunity of showing cause against the proposal to dismiss or reduce him. It is also significant that there is no indication as to the authority by whom the action is to be proposed. It does however seem to us that the sub-section requires that as and when an authority is definitely proposing to dismiss or to reduce in rank

1. (1942) 2 M.L.J. 794: (1941) F.C.R. 37: (1942) 5 F.L.J. 99.
2. (1937) 1 M.L.J. 529: L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532 (P.C.).

a member of the civil service he shall be so told and he shall be given an opportunity of putting his case against the proposed action and as that opportunity has to be a reasonable opportunity, it seems to us that the section requires not only notification of the action proposed but of the grounds on which the authority is proposing that the action should be taken and that the person concerned must then be given reasonable time to make his representations against the proposed action and the grounds on which it is proposed to be taken. It is suggested that in some cases it will be sufficient to indicate the charges, the evidence on which those charges are put forward and to make it clear that unless the person can on that information show good cause against being dismissed or reduced if all or any of the charges are proved, dismissal or reduction in rank will follow. This may indeed be sufficient in some cases. In our judgment each case will have to turn on its own facts, but the real point of the sub-section is in our judgment that the person who is to be dismissed or reduced must know that that punishment is proposed as the punishment for certain acts or omissions on his part and must be told the grounds on which it is proposed to take such action and must be given a reasonable opportunity of showing cause why such punishment should not be imposed. That in our judgment involves in all cases where there is an enquiry and as a result thereof some authority definitely proposes dismissal or reduction in rank, that the person concerned shall be told in full, or adequately summarised form, the results of that enquiry, and the findings of the enquiring officer and be given an opportunity of showing cause with that information why he should not suffer the proposed dismissal or reduction of rank.

If that be the true meaning of the section, it seems to us one to which statutory effect in the sense that breach of it will give rise to a cause of action can without any of the difficulties or inconveniences indicated in *Venkata Rao's case*[1] be given. It can in our judgment be regarded as a provision in the Constitution Act which while it does not alter the tenure of office during His Majesty's pleasure prescribed by sub-section (1) of section 240, or the power of dismissal at will, does impose in certain cases certain statutory obligations to be carried out before dismissal is effected, breach of which will give to the person adversely affected a cause of action. It is clear that no such opportunity as indicated above was given to Mr. Lall in this case. In spite of his repeated efforts to be informed of the results of Mr. Anderson's and Mr. Brayne's enquiries and to make representations on their reports no such opportunity was given to him. No information was given to him of the proposals of the Punjab Government or of the Federal Public Service Commission or of the Government of India that he should be dismissed. He could make no representation against such proposed action. In the circumstances of this case the early notice contained in the charge-sheet that possibly dismissal might be decided upon is not in our judgment adequate compliance with the sub-section. It follows that much of the discussion as to the respective requirements of sub-section (3) of section 240 and rule 55 and as to whether the words "adequate opportunity of defending himself" are or are not the equivalent of the words "reasonable opportunity of showing cause against the action proposed" and as to whether Mr. Brayne duly complied with the provisions of rule 55 becomes irrelevant. In our judgment the wording of sub-section (3) requires something which was not done in this case. It is not necessary to determine whether rule 55 also required it generally or on the facts of this case. We have only to determine in the light of the facts of this case the true meaning and effect of sub-section (3). In our judgment Mr. Lall was dismissed without having been afforded the reasonable opportunity of showing cause as required by this sub-section.

That leaves only the actual remedy to be considered. As indicated earlier, Mr. Lall is not in our judgment entitled to a declaration that he has never been dismissed or that he still remains a member of the Service. His proper remedy was in our judgment damages for wrongful dismissal in breach of the statutory obligations imposed by sub-section (3) of section 240. Mr. Lall has not asked for

1. (1937) 1 M.L.J. 529: L.R. 64 I.A. 55: I.L.R. (1937) Mad. 532 (P.C.).

damages. In the High Court every one appears to have taken the view, with which we respectfully cannot agree, that his remedy, if any, would be a declaration that his dismissal was a nullity. No question of a right to damages appears to have been discussed. This no doubt followed because of the judgment of this Court and the form of the relief allowed under sub-section (2) in *Suraj Narain Anand's case.*[1] We doubt not however that if the learned Judges or either of them had considered that in a claim for breach of the provisions of sub-section (3) of section 240 damages might be the proper remedy, Mr. Lall would in the circumstances of this case have been given leave to amend and claim damages notwithstanding the length of time that had expired after his wrongful dismissal. Mr. Lall and every one in our view mistook the proper remedy for the reasons indicated. In these circumstances this may well be regarded as an exceptional case, where to secure justice, leave to amend should be given at this late stage. We are the first appellate Court in this case and we would ourselves give leave to amend and attempt to assess the damages, had there been proper materials for assessing damages before us. In the circumstances we propose to make a declaration that for the order of the High Court there shall be substituted an order declaring that Mr. Lall was wrongfully dismissed on the 4th June, 1940, in breach of the statutory obligations imposed by sub-section (3) of section 240, and remit the case to the High Court to take such action in regard to any application by Mr. Lall for leave to amend to claim damages, and the assessment of such damages as to the High Court shall seem right in view of this judgment and our remarks herein. In our judgment in the circumstances, Mr. Lall is entitled to his taxed costs of this appeal and we order accordingly.

We might add however that we have had the opportunity of reading the judgment about to be delivered by our brother Varadachariar and we would state that if, as he holds, the requirements of sub-section (3) of section 240 demand nothing beyond what is required for compliance with the provisions of rule 55, we would agree with him in the conclusions which appear to him to be the right ones to draw upon a full examination of the facts in this case.

Varadachariar, J.—I agree that the Secretary of State had authority to remove the plaintiff from the Indian Civil Service (issue 1). I shall assume that, if the plaintiff had been dismissed without giving him a reasonable opportunity of showing cause against it, he would be entitled to seek redress in a Court of law (Preliminary issue, issue 2 and the latter part of issue 5). It would follow that the Court would be entitled to determine whether the opportunity given was reasonable or not (issue 6). Two questions then remain for decision: the first relates to the nature of the opportunity required by law to be given (issue 3); this turns on the interpretation of section 240 (3) of the Constitution Act; the second relates to the nature of the opportunity actually given to the plaintiff (issues 4 and 5); this turns not so much on the appreciation of the evidence—which is in the main documentary and undisputed—as on the proper inference to be drawn from the evidence. It is not necessary to deal with issues 7 and 8 separately, because the findings of the High Court on these issues do not take the plaintiff further than the finding on issues 4 and 5.

I regret I am not able to concur in the interpretation which my Lord and my learned brother place upon clause (3) of section 240 of the Constitution Act. Though that provision was first enacted in the statute itself only in 1935, a similar safeguard was previously contained in Statutory Rules framed under section 96-B of the Government of India Act of 1919. There had been for sometime a conflict of decisions in this country as to whether a public servant dismissed from his office without an enquiry held in accordance with these rules had a remedy by civil action or not. In 1936, the Judicial Committee decided that he had none (*Venkata Rao's case*). The Constitution Act of 1935 was passed before this decision. Rule 55 of the rules in force at the time comprised three parts, one which enunciated the general principle that no order of dismissal, removal or reduction should be passed

1. (1942) 2 M.L.J. 794: (1941) F.C.R. 37: (1942) 5 F.L.J. 99.

on a member of a service, unless he had been informed in writing of the grounds on which it was proposed to take action and had been afforded an adequate opportunity of defending himself; a second which dispensed with this requirement in certain cases; and a third which prescribed in some detail the procedure by which the general principle first enunciated was to be given effect to. This rule formed part of a group headed "Conduct and Discipline" beginning with rule 47 and these rules provided for "disciplinary action" in respect of members of the six classes of services specified in rule 14. Rule 49 enunciated seven kinds of penalty or punishment and rule 55 was applicable only to three of these penalties, *viz.*, dismissal, removal or reduction. The Constitution Act of 1935 provided (by section 276) for the pre-existing rules continuing in operation (so far as they were consistent with the new Act) but it thought fit to make provision in the Statute itself in respect of some of the matters dealt with in rule 55. A comparison of clause (3) of section 240 with the rule will show that (subject to certain differences of wording to which I shall presently refer) the general principle of notice and opportunity for defence as well as the exceptions to its application have been incorporated in the Statute itself while the details of the procedure by which the principle is to be given effect to are allowed to remain matters for rules.

The new method of providing the safeguard for the services will certainly have one important consequence, namely, that it will place it beyond the power of the rule-making authority to deprive the services, by any change in the rules, of the benefit of the general principle of notice and opportunity for defence. It may also have another result—and, as stated at the outset, I assume it to be so for the purposes of this case—namely that the dismissal of an officer without giving him such opportunity may entitle him to seek redress in a Court of law. The decision to the contrary in *Venkata Rao's case* rested in some measure on the ground that it could hardly have been intended to allow the statutory declaration of tenure "at the pleasure of the Crown" to be qualified or restricted by rules which were expected to provide for a variety of matters of different degrees of importance. A provision like clause (3) made in the Statute itself may with greater force be claimed to be a qualification of or even a part of the declaration contained in clause (1) of the same section as to the nature of the tenure. Assuming this to be so, the further questions for determination in this case are: (*i*) what is the nature of the opportunity which on the true construction of clause (3) should be given to the officer concerned—is it the same as that required by rule 55 or is it substantially different; and (*ii*) whether such opportunity has in fact been given to the plaintiff in this case. The first question would not arise for discussion in this appeal if I were able to accept the finding of the High Court on issue 4, to the effect that the plaintiff was not given an adequate opportunity even in accordance with rule 55. Adequacy of opportunity within the meaning of section 240 (3) was made the subject of a separate issue (No. 5); but the learned Judges of the High Court have not proceeded on the footing that there was a difference between the nature of the opportunity required by rule 55 and the nature of the opportunity contemplated by section 240 (3); indeed they definitely reject the plaintiff's contention that he should have had two opportunities, one at the stage of enquiry and the other at the stage of the determination of the appropriate punishment. The two issues seem to have been raised separately, only in view of the possible difference in legal result between the two cases, *viz.*, that a violation of rule 55 may not entitle the aggrieved officer to seek redress in a Court of law but a violation of the statutory condition prescribed by clause (3) of section 240 may furnish a cause of action for a suit. So far as the question of fact is concerned the learned Judges have dealt with the two issues together. For reasons to be stated presently I find myself unable to concur in the finding of fact recorded by the High Court on issues 4 and 5.

It is in this view that it becomes material to consider whether the question of compliance with clause (3) of section 240 has to be judged by a different test from that applicable to rule 55. If as a matter of law it should be held that the plaintiff

should have been given an opportunity, after Mr. Brayne had submitted his report, to show cause against that report, it was not the defendant's case and the evidence does not therefore establish that such opportunity was given. It has been contended by the plaintiff that the difference in language between rule 55 and section 240 (3) involves a difference in the test applicable under the two provisions. I am of the opinion that the verbal difference has only arisen from a difference in the method of drafting and does not involve or imply a difference in substance. In rule 55 one of the exceptions was expressed parenthetically, by the words "other than an order based on facts which had led to his conviction in a Criminal Court" and the other exception was stated separately, in the second paragraph of the rule. This was apparently considered capable of improvement; accordingly when embodying the provision in the Statute, the two exceptions were brought together and with some verbal changes (not now material) they were enacted as Provisos (*a*) and (*b*) to clause (3). The rule refers to three kinds of punishment, *viz.*, dismissal, removal or reduction; clause (3) refers only to dismissal or reduction, because by an interpretation clause (section 277) applicable to the whole of Part X of the Constitution Act, "dismissal" has been made to include "removal." The change on which particular stress has been laid in support of the plaintiff's case is the substitution in the statute of the words "reasonable opportunity of showing cause against the action proposed to be taken" for the words "unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself." It seems to me that the Statute has adopted that language only with a view to express the principle with greater brevity, as the details were expected to be provided for by the rules. The subsequent part of rule 55, which prescribes how the information of the grounds is to be given and shows what is meant by adequate opportunity of defence fits in as much with the phraseology of clause (3) of section 240 as with the language of rule 55 and I see no reason to think that rule 55 is inconsistent with section 240 (3) and must be held to be no longer in operation.

It has been contended that the language of clause (3) of section 240 would be satisfied only if an opportunity to show cause were given *after* the authority concerned had received the Report of the Enquiring Officer and was in a position to make up its mind as to the action to be taken thereon, *viz.*, whether the punishment was to be one of dismissal or only reduction. It has been further contended that such opportunity cannot be regarded as "reasonable," unless the officer against whom proceedings are being taken is given an opportunity of perusing the Report of the Enquiring Officer or is at least informed of his finding and is then given an opportunity to argue against those findings. I am unable to read all this into the substituted words.

The plaintiff's contention was also stated in another form. It was said that section 240 (3) must have contemplated cause being shown to the authority competent to dismiss the officer and as, in the present case, that authority was the Secretary of State, it followed that opportunity should have been afforded to the plaintiff to show cause before the Secretary of State after Mr. Brayne had made his report and the Punjab Government had made its recommendation. Section 240 (3) is of general application to all officers and is not limited to members of the All-India services. If, in any case, cause is shown before the Enquiring Officer, any representation which the officer charged may make will form part of the record and will presumably be considered in due course by the authority finally dealing with the matter. Further, the time factor is not the material point in this case; it appears from the report of the Federal Public Service Commission to which the matter was referred under section 266 (3) (*c*) of the Constitution Act, that a representation was made by the plaintiff to that Commission. This was after Mr. Brayne had made his report and the Punjab Government had made its recommendation. The real question is whether the plaintiff had a right to be informed of Mr. Brayne's findings and of the grounds therefor, before making his representations.

It is clear that the framers of sub-section (3) of section 240 had the language of rule 55 before them. According to the elaborate procedure prescribed by the latter part of the rule, what was required was that the charges should be communicated to the person charged, with a statement of the allegations on which each charge was based and of any other circumstances which it was proposed to take into consideration in passing orders on the case. The officer charged can put in a written statement of his defence, ask for an oral enquiry if he so desires and also ask to be heard in person. The Enquiring Officer was expected to make a record of the evidence and to state his findings and the grounds thereof. It is obvious that the rule did not contemplate the officer charged being given a copy of the finding of the Enquiry Officer and permitted to canvass its correctness. It cannot be denied that the steps provided for in rule 55 will be equally necessary under section 240 (3); for the officer concerned cannot be held to have had a reasonable opportunity unless he had been informed of the charges against him and had been allowed to put forward his defence and to take part in the enquiry. Is there anything in the language of clause (3) to indicate that anything more or anything different was contemplated or to suggest that a further opportunity was to be given after the enquiry had been completed in the presence of the officer charged and the Enquiring Officer had made his report? I find none; and I venture to think that if such an additional step had been intended, such intention would have been more clearly indicated. The words "against the action to be taken" found in the clause only expressed in another form the effect of the words "on which it is proposed to take action" found in two places in the rule. I am unable to accept the suggestion that the words of the statute are appropriate only to the stage when the authorities are in a position to indicate definitely what action they intend to take, *viz.*, whether it is to be one of dismissal or one of reduction and this can be predicated only after the Enquiring Officer has made his Report. The word 'proposed' seems to me to militate against this contention. Even in the view that opportunity is to be given after the Report, the decision as to the particular action to be taken can be reached only later, that is, after hearing what the officer charged has to say against the findings of the Enquiring Officer. It will be equally appropriate to speak of "action proposed to be taken" even at the stage of communication of the charges, the implication being that action appropriate to the charges will be taken unless the charges are rebutted. That this is practicable is shown by the form of the charges communicated to the plaintiff in this case. Under each charge, the evidence relating to it was briefly indicated and the notice concluded, "the above facts.......................... are sufficient to prove that he has abused his position...................... He should show cause why he should not be dismissed, removed, reduced or subjected to such other disciplinary action as the competent authority may think fit to enforce................" The concluding words as to the nature of the punishment had to be in that alternative form because there was always the possibility that the officer charged might rebut the charges or reduce their seriousness and the ultimate decision rested with the Secretary of State (as the plaintiff belonged to an All-India service) while the notice was given by and the enquiry conducted under the orders of the Provincial Government. The notice however certainly contains an indication of the action proposed to be taken and an invitation to show cause against it.

It has been elicited from Mr. Bourne (P. W. 1) that in one case a fresh notice was served on the officer charged, after the Enquiring Officer had submitted his report. The practice seems to have varied from time to time. A note slip added to rule 55 (in the P. & T. Edition of the Fundamental and Supplementary Rules) records a decision of the Secretary of State (No. 677) dated 28th May, 1943, to the effect that "the technical requirements of section 240 (3) of the Government of India Act will be complied with if, when an officer is called upon to offer the defence in respect of the charges against him he is also asked at the same time to show cause against the imposition of the penalty considered *prima facie* to be appropriate should

the charges against him be held to have been proved .... it should in such cases be made clear to the officer concerned that any representation that he might make in regard to the action to be taken against him in the event of all the charges or any of them being held to be proved will be considered by the final authority concerned before any order punishing him is passed." As the statutory provision itself is very recent, this is not a case in which practice, even if uniform, can be called in aid in the interpretation of the Statute.

The plaintiff contended that the Provincial Government had no authority to initiate an enquiry into the conduct of a member of an All-India service. This contention is untenable. Even members of an All-India Service are, when they serve in a Province, subject to the authority and the rule-making power of the Governor, except in so far as rules made by the Secretary of State provide otherwise (section 247 of the Constitution Act and rule 52 of the Secretary of State's rules) ; and rule 50 only provides that no member of an All-India Service............ shall be removed or dismissed except by order of the Secretary of State (I omit the words "in Council" as no longer relevant).

The plaintiff also urged that the Punjab Government had no power to direct a further inquiry by Mr. Brayne when Mr. Anderson had already held an inquiry into the charges against the plaintiff and submitted his report. This contention is also untenable. The matter of the inquiry is primarily one for the decision of the executive authority. In the present case, Mr. Anderson himself felt that for want of time he could not complete the inquiry and though he expressed his views on the materials then before him, he recommended to the Government to treat his inquiry as only a preliminary inquiry and to depute some officer to make a complete investigation. This is what Mr. Brayne was directed to do.

I now proceed to deal with the findings of the High Court on the question of fact raised by Issues 4 and 5. The Advocate-General of India applied for and was granted leave to argue this question and we have heard full arguments thereon from both sides. It has to be emphasised at the outset that the Court has no right to examine the correctness of the inferences drawn or conclusions reached by the Enquiring Officer or by the responsible authorities. It follows that any opinion that the Court may form on these points or on the appropriateness of the punishment meted out to the officer cannot be allowed to influence the consideration of the only point open to examination by the Court, namely, the adequacy of the opportunity afforded to the plaintiff. The learned Judges of the High Court recognised this limitation on the Court's power ; but some of their observations read very much like stating that on certain points the materials before Mr. Brayne did not warrant the adverse inference which he drew. The course of the inquiry and the relevant portions of the correspondence have been referred to in detail in the judgment of my Lord and it is unnecessary for me to re-state them here. The finding of the High Court on Issues 4 and 5 is based on the following four grounds :—

(A) that as the plaintiff was denied copies of Mr. Anderson's report and of the directions given by the Government to Mr. Brayne, he was not fully able to grasp the method and the scope of Mr. Brayne's inquiry and to fully appreciate the implications of the material which was used against him ;

(B) that as Mr. Brayne did not communicate to the plaintiff the impressions which the new documents produced on his mind and did not put questions to him with reference thereto, Mr. Brayne has caused great prejudice to the plaintiff and deprived him of the opportunity of explaining away whatever appeared against him ;

(C) that by declining to adjourn the inquiry to January 1939 and by hustling the inquiry, the Enquiring Officer has greatly embarrassed the plaintiff and made it difficult for him to present his defence properly ;

(D) that Mr. Brayne was receiving evidence behind the back of the plaintiff (this is suggested rather than stated).

With all respect to the learned Judges, I am of the opinion that the evidence does not establish any of the above grounds I shall take the grounds *seriatim* :—

A. It is not for me to say whether it would not have been proper for the Punjab Government to furnish the plaintiff with a copy of Mr. Anderson's report and of the direction issued by the Government to Mr. Brayne in connection with the further inquiry to be held by him. Now that both these documents are on the record, I am satisfied that so far as the scope and method of the further inquiry were concerned Ex. H.P.-21, the letter which Mr. Brayne wrote to the plaintiff on the 29th November, 1938, gave the plaintiff all the information which he could have obtained from Mr. Anderson's report and the Government's order to Mr. Brayne. This letter was written in reply to Ex. H. P.-19 from the plaintiff to Mr. Brayne, dated the 24th November, 1938. Plaintiff asked :

"I wish, however, to know on what points have you to complete the inquiry."

To this Mr. Brayne replied :

"At Multan I propose to study the seniority list and candidates register and the service-books of these employees and candidates mentioned in the chains of changes in which Sundar Das figures. I also propose to look at other establishment cases dealt with by you between October 1936, and March, 1937, both to see how many there were and how they were reported on and dealt with in comparison with those concerned with my inquiry. For similar purposes of comparison, I shall also look at entries made by you in character rolls. There are other papers I shall try to see, such as the reversion by Mr. Bedi of Sundar Das in the summer and his re-appointment by you at the end of October, the other Sundar Das' transfer to Alipore, and the inspection notes of the Courts in which the five clerks who appealed were employed as referred by you in your statement to Mr. Anderson."

This letter, read in the light of the charges which had already been communicated to the plaintiff, gave him a clear idea of the nature of the inquiry which Mr. Brayne proposed to hold, of the kind of documents which he proposed to examine and the purpose for which he intended to do so. The learned Judges of the High Court themselves referred to this document as one of importance and reproduced it in full in their judgment ; but they have not compared it with the concluding portion of Mr. Anderson's report and the concluding portion of the Government's order to Mr. Brayne to see that this letter contained all the information which could have been gathered from the report and the Government's order, as to the nature and purpose of the further inquiry. At the end of the report Mr. Anderson said :

"To take one small point. I am asked to conclude that because Mr. Lall made four adverse comments in four character rolls, he was animated by improper motives. Before coming to any such conclusion, it would obviously be necessary to have some standard to know what sort of remarks Mr. Lall is in the habit of recording in character rolls, and to inquire on the spot into the circumstances in which he recorded remarks."

It is with reference to this remark and one or two other similar remarks that the Government told Mr. Brayne :

"You will gather from Mr. Anderson's report on what points further inquiry is necessary."

Mr. Brayne in his letter to the plaintiff did not refer to the other points of inquiry suggested in Mr. Anderson's report, apparently because he did not consider it necessary to go into them. For instance, Mr. Anderson suggested that it might be necessary to examine two of the Judges of the High Court ; Mr. Brayne thought it unnecessary. Even before us, the plaintiff could not explain what light those Judges could have thrown on any part of the case against him. Again, Mr. Anderson suggested that evidence should be taken as to whether Alipore to which two of the offending clerks had been transferred was a Penal Station ; But it was clear even from the plaintiff's answer to Charge No. 7 that the two clerks, Ishwar Das and Khem Chand, were sent to Alipore only as a 'disciplinary measure' because they were 'mischievous' men and he added :

"If he were a very good man, he would not be posted in Alipore."

On this statement, it was obviously unnecessary to take any further evidence as to the result or purpose of posting the clerks to Alipore. In their letter to Mr. Brayne, the Punjab Government had further said :

"It will be as well if you go into the chain of promotions which resulted in Mr. Lall's order of 22nd March, 1937, appointing Sundar Das a paid candidate and see if it is an order."

This direction also was communicated to the plaintiff by Mr. Brayne in Ex.H. P.-21. I am accordingly unable to agree that any prejudice was caused to the plaintiff by the order of the Government declining to furnish him with copies of Mr. Anderson's report and its direction to Mr. Brayne.

It is true that the plaintiff took strong exception to there being any further inquiry at all. As stated by him in his letter to Mr. Brayne, dated the 18th December, 1938, and further elaborated by him in his deposition in the suit, his position was that Mr. Anderson had completed his inquiry and practically exonerated the plaintiff of all the serious charges. Referring to Ex. D.-2 (which is the same as Ex. H.P.-21) he deposes:

"My reaction to this was that what Mr. Brayne proposed doing at Multan was wholly outside the scope of an inquiry prescribed by rule 55 and I also had a doubt whether he had been ordered by the Government to hold an enquiry of this type or that the Government or the Governor had any executive authority to order such an inquiry. This letter, (Ex. D.-2) did not appear to me to be an adequate answer to my letter of the 24th December, 1938."

One may sympathise with the plaintiff's annoyance but he was not right in his view of the law and as to the powers of the Punjab Government. In any event, such objections are very different from the contention that he had not been informed of the method or scope of the proposed inquiry by Mr. Brayne.

B. Ex. H. P.-21 itself gave the plaintiff a fair idea of the nature of the evidence that Mr. Brayne proposed to examine and of the purposes for which he intended to do so. Even if it could be said that the letter did not by itself give sufficient information to the plaintiff, the matter is placed beyond doubt by what happened on the 20th December. In his letter of the 18th December, 1938, (paragraph 6) the plaintiff complained:

" When I appeared before you at Multan (on the 9th December) I did not know what documents you had studied, and how you had been influenced by them. These documents are not mentioned in any of the charge-sheets with which I have been supplied. I do not know to which particular charge they appertain. I also do not know how they are relevant to the inquiry . . . I do not know whether the study of seniority list, etc., is for the purposes of investigation, or there are any definite allegations which bear on the charges and which are sought to be proved by these documents. If so, I have not been informed of them and hence I am unable to rebut them."

This paragraph is important in appreciating what happened when the plaintiff and Mr. Brayne met on the 20th December. The proceedings of that day are recorded in Ex. D-7. The first paragraph states:

"I have explained to Mr. Lall the relevancy of the new documents of which copies have been sent to him."

In his evidence in the suit, Mr. Brayne explained that by these words he meant that he had explained the bearing that those documents had on the charges framed against him. He addes:

"As an instance, I explained to him why I had collected the character rolls of 42 people and told him that I wanted to see whether the entries made against the four persons in this case were ordinary entries usually made by him or they were exceptional entries."

Nothing has been suggested in the course of the evidence to throw any doubt on the truth of the statement of Mr. Brayne. Assuming that the plaintiff, who had called Mr. Brayne as his own witness, was in some embarrassment about cross-examining him, the plaintiff, who gave his evidence after Mr. Brayne had been examined, has not said that the story is not true. All that he says is that Ex. D.-7 was not recorded in his presence but he admits that he received a copy of D.-7 on the 22nd December, and he never disputed the correctness of the statement with which it opens.

For a full appreciation of the significance of what happened on the 20th December, it is also necessary to refer to what happened between the 9th December and the 18th December. On the 9th Mr. Brayne has recorded (H.P.-29):

"Further documents collected were shown to Mr. Lall" and he adds a note of plaintiff's request "that he may be given adequate time to understand his position. Meanwhile he requests that he may not be asked any questions with regard to these new documents or the case is general."

I am unable to accept the plaintiff's statement that on the 9th December, the documents were not there and that they were not shown to him. As usual, a copy of the order of 9th December was given to him shortly thereafter; he admits in his deposition that he had a copy of the order with him when he wrote his letter of the 18th December, 1938, and he did not contest the truth of this statement. The concluding portion of Ex. H.P.-29 said "copies of the relevant parts of the new document will be sent to him immediately by post." On the 11th December, 1938, Mr. Brayne wrote Ex. H.P.-65 to the plaintiff, it says:

"Herewith copies of relevant parts of the new papers collected (*vide* list attached); if you wish to see original on 20th, please let me know in ample time, as some of them have been returned .... Two papers will follow to-morrow."

This letter was accompanied by copies of a large number of documents. In his letter of the 18th December (paragraph 5), the plaintiff admits having received these copies on the 12th and 16th and he refers to them as "copies of documents that you had studied at Multan." That the plaintiff must have carefully gone through these copies is shown by Ex. H.P.-31 and H.P.-31-A dated the 18th December. This sets out a letter from the plaintiff dated 15th December, 1938, and gives by way of marginal notes Mr. Brayne's answers to a number of queries made by the plaintiff with reference to some of the documents of which copies had been sent to him. H.P.-34, a letter from the plaintiff to Mr. Brayne dated the 23rd December, 1938, is also significant. It acknowledges receipt of a copy of Mr. Brayne's order, apparently Ex. D.-7 and proceeds to say:

"I want to see whether representation or petitions of some of the clerks were received by Chaman Lall by post as stated by him, or were presented to him in person. I want to see the endorsement on each petition. I also consider it necessary to verify the dates. It may also be necessary to see the note of Chaman Lall dated 2nd or 3rd March, regarding copies."

This letter shows that various details of the case were receiving the closest attention of the plaintiff all the time. The learned Judges make a point of the fact that no reply *in writing* was sent to plaintiff's letter of the 18th December. That was obviously due to the fact that the whole situation was cleared up when Mr. Brayne met the plaintiff on the 20th and that is what D.-7 records. The plaintiff's query (in his letter of the 18th December) as to whether the new documents relate to the old charges or whether there are any definite allegations which bear on the charges, etc., is to say the least disingenuous, because the purpose and use of these new documents have been explained to him in Ex. H.P.-21. Anyhow the matter was made clearer by the explanation given by Mr. Brayne on the 20th December.

There is little substance in the argument that the plaintiff has been prejudiced because no questions were put to him with reference to the new documents nor any information given to him as to the inferences which Mr. Brayne was inclined to draw from these documents. The evidence already referred to in some measure furnishes the answer. On the 9th December, the plaintiff requested that he might not be asked any questions with regard to the new documents (as recorded in Ex. H. P.-29). Between the 12th and the 20th December he had been furnished with copies of relevant portions of these documents and had studied them. On the 20th December, the interview lasted about 3 hours and Ex. D.-7 records "Mr. Lall has addressed me about the case." This must relate to the "merits" because the earlier paragraphs of the order deal with the objections to "procedure." Plaintiff in his evidence admits that "on the 2nd January, Mr. Brayne discussed one document with me." His only apprehension was that Mr. Brayne "might have several more documents of which I had no knowledge." The report is not based on any documents not disclosed to the plaintiff. Even assuming that no questions had been put to the plaintiff by Mr. Brayne with reference to the disclosed documents, it has to be remembered that the charges served on the plaintiff had themselves indicated the *prima facie* inference which the documents there referred to, interpreted in the light of the surrounding circumstances, suggested. The further inquiry was undertaken, on the suggestion of Mr. Anderson, only to see whether the *prima*

facie adverse inference to be drawn from plaintiff's conduct was rebutted either by any evidence in justification of the plaintiff's conduct or by any evidence showing that the plaintiff was usually severe and rough in dealing with all his subordinates. The later evidence is thus not in any sense incriminating evidence or evidence intended to prove the charges; it was rather in the nature of evidence calculated, if possible, to exculpate the plaintiff. That the plaintiff was himself aware of the value of that kind of evidence is shown even by his answers to the charges. Thus, in answering Charge No. 7, he refers to the remarks made by his predecessor regarding Khem Chand (one of the clerks punished by him) as proof that that clerk was really deserving of punishment; in respect of one or two other clerks he mentions having heard that they were making money by supplying copies of records privately to the applicants. In his statement before Mr. Anderson, he said (dealing with Charge No. 6) that he had heard complaints against some of them and made inquiries about them from Ch. Radha Kishan, a leading lawyer of Multan. Such items of evidence are in the nature of justification or exclupation; but the plaintiff stated at the outset that he did not want any oral inquiry and he never afterwards asked for any of his alleged informants being examined. This certainly does not show that he did not understand the bearing or value of such evidence. I am unable to appreciate the force of the argument (based apparently on section 342 of the Criminal Procedure Code) that it was Mr. Brayne's duty to question the plaintiff with reference to what appeared against him in the evidence. The new documents were in no sense evidence adverse to the plaintiff. They only failed to remove the *prima facie* adverse inference which the plaintiff's conduct interpreted in the light of the surrounding circumstances suggested.

C. It is true that when the plaintiff received a letter from Mr. Brayne suggesting that the inquiry might start early in December, the plaintiff expressed a desire to have it started after the Christmas. But we hear nothing further about this thereafter and whatever personal inconvenience this might have involved to the plaintiff (specially because of his touring duties about this time), there is no trace in the evidence of anything like embarrassment to the plaintiff on this account. He no doubt felt annoyed or (as he said) even humiliated by the thought that there was to be a further inquiry at all and this might have naturally upset him but that is a different matter. If his touring duties interfered with the conduct of his defence, we find no such complaint and he made no attempt to take leave to enable him to conduct his defence properly. Indeed, when one bears in mind the nature of Mr. Brayne's inquiry, there was really not much for the plaintiff to do beyond what the evidence shows that he has done. There is no force in the argument that Mr. Brayne did in 2 or 3 days what Mr. Anderson expected might take 15 days to do. We have no means of knowing what Mr. Anderson intended to do; but the plaintiff has not shown and we have not been able to see what there was in the case that required more time than Mr. Brayne actually spent on it. An observation of the learned Judges suggests a possible misreading of one of the paragraphs of Ex. D-7. They seem to accept the plaintiff's contention that "even on the 20th December.............documents were still in course of collection." The reference in Ex. D-7 to "the documents sent for" is, I think, to the two documents referred to earlier as asked for by the plaintiff. The last paragraph itself shows that if they had contained anything material, plaintiff would have been allowed to say what he wished to say about them. Presumably they contained nothing and we therefore hear nothing more about them. The correspondence shows that Mr. Brayne gave to the plaintiff every facility that it was in his power to give and never refused any request made by the plaintiff except when higher authority prevented his complying with such a request.

D. I have not been able to understand what the learned Judges had in mind, when they spoke of a possible view that:

"Mr. Brayne was receiving evidence behind the back of the plaintiff".

The observation is made when they refer to a confidential note-book kept by the plaintiff and referred to in Mr. Brayne's report. Even assuming (as hinted by plaintiff) that this book could not have remained in the Court house but must have been given to Mr. Brayne by Chaman Lall, nothing turns on it, so long as no question has been raised as to its genuineness nor as to the plaintiff's knowledge of its existence or its contents. The book itself contains only a few entries and copies of all the entries were sent to plaintiff along with Ex. H.P.-65 (it is item 23 of the list attached to that letter). There is nothing in the document to tell against the plaintiff and it is not correct to speak of Mr. Brayne using it *against* the plaintiff. It contains no more relevant information than is found in plaintiff's statement before Mr. Anderson in respect of Charge No. 6. If anything, it is more favourable to him in that it includes Akbar Ali the Examiner among his informants. Mr. Brayne's characterisation of the information therein contained as "hearsay" is confirmed by one of Mr. Lall's own entries (which formed the basis of the charge), where speaking of disciplinary action against the clerks he adds: "I also have heard complaints against them." I do not see that it was Mr. Brayne's duty to ascertain what inquiries Mr. Lall had made about the character of these clerks, when Mr. Lall himself did not ask his informants to be examined. Whether or not Mr. Brayne drew the right inference from these entries is not a matter for the Court. Even if it should be held that Mr. Brayne should have examined certain witnesses before coming to certain conclusions that would not amount to a denial of opportunity to the plaintiff to show cause, unless the plaintiff had desired those witnesses to be examined but they were nevertheless not examined.

I have discussed the main grounds set forth in support of the High Court's finding and I do not ignore the possibility that though each circumstance may not be serious by itself, their cumulative effect may be considerable. I think the circumstances of the case do not individually or collectively warrant the conclusion that the plaintiff has not had a reasonable opportunity of showing cause against the charges during the time of Mr. Brayne's inquiry. It must be remembered that after all there is little complexity about the case; the plaintiff pleaded guilty to Charges 1 and 2 and even as to Charge No. 3, he admitted the relevant facts though he pleaded that he acted under a mistake; on Charge 4 he has been exculpated. As to Charges 5 to 8, there is no dispute about the facts themselves; the only question was whether, as the circumstances suggested, the plaintiff acted vindictively against the clerks concerned, because they had questioned the plaintiff's partiality to his wife's relation or whether he had other reasons or justification for dealing with them in that manner. It is difficult to appreciate the force of the argument that the plaintiff who had been a District and Sessions Judge himself did not understand the bearing of various facts and circumstances on one aspect or the other of the case.

As I am of the opinion that the finding on issues 4 and 5 should be against the plaintiff, it would follow that he is not entitled to any relief in this suit.

By the Court.—In accordance with the opinion of the majority of the Court it is ordered that, in place of the order of the High Court, there shall be substituted an order declaring that the plaintiff Mr. Lall was wrongfully dismissed from the Indian Civil Service on the 4th June, 1940, but such substituted order shall not affect the order as to costs made by the High Court and it is further ordered that the case be remitted to the High Court with a direction that the High Court do take such action in regard to any application by Mr. Lall for leave to amend to claim damages as to the High Court shall seem right in view of the judgment of, and the remarks contained in the judgment of, the majority of this Court.

Except as aforesaid, the appeal of the Secretary of State for India is dismissed with costs; such costs to be taxed by the Taxing Officer of this Court.

The cross-objections are dismissed. No order is made as to the costs of the cross-objections.

Leave to appeal to His Majesty in Council refused.

G.R./V. S. *Order varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

T. S. Chockalingam .. *Appellant.**

Newspaper Control Order (1942), clause 5 (1)—Publishing newspaper with excessive number of pages in violation of the order—Newspaper Control Order of 1944 superseding that of 1942 removing the prohibitions contravened—Effect—Publication if ceases to be offence—General Clauses Act, section 6—Principles of—Applicability.

In the absence of any provision in the Newspaper Control Order of 1944 in respect of acts which are offences under the superseded Newspaper Control Order of 1942 and which have become offences liable to be proceeded against, the offender could be proceeded against and punished as if the old Order had been in force in respect of those particular offences. The offences of publishing pages in excess of the controlled number in a newspaper were completed the moment they were committed and the mere fact that in the superseding order this was not made an offence does not help the accused.

The provisions of the General Clauses Act though they do not apply as such can be looked into, as a rule of prudence, in dealing with the interpretation of the orders.

Banwari Lal v. *Emperor*, A.I.R. 1943 Cal. 285, applied.

Appeal against the order of the Court of the Chief Presidency Magistrate, Egmore, Madras, in C. C. No. 2684 of 1945.

N. Rajagopalan and *N. S. Krishnaswami Ayyangar* for Appellant.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant is the editor, printer and publisher of the vernacular daily paper "*Dinasari.*" He has been convicted by the Chief Presidency Magistrate, Egmore, of offences punishable under clause 5 (1) of the Newspaper Control Order, 1942, on the ground that he had published during the weeks ending 25th June, 1944, and 2nd July, 1944, newsprint covering 28 and 32 pages respectively, in violation of clause 5 (1) of the said Newspaper Control Order limiting the number of pages to be published in a week to 26, and sentenced to pay a fine of Rs. 200 on each count.

There are no disputes about the facts of this case; but what was contended was that no prosecution can lie under the Newspaper Control Order of 1942, as it was superseded by the Newspaper Control Order of 1944, which came into force on 17th July, 1944, which contained no provisions similar to clause 5 (1) of the earlier Order, and that on the date on which he was prosecuted there was no law in the Statute book under which he had committed any offence in respect of the acts complained of. In short, the argument was that even though it was an offence under the Order as it stood on the date on which the publications were made, still by reason of the fact that the law which he is said to have contravened was superseded and ceased to be the law on the date on which he was prosecuted he could not be held to be guilty of any offence.

The question as to whether an offence was committed or not depends on the state of the law when the offence was committed and not on the law as it is on the date on which the prosecution is started. In the case of penal provisions, a person who commits an offence becomes liable the moment the offence is committed. But what is urged for the appellant is that this interpretation of the law is incorrect and that the provisions of the General Clauses Act do not apply to the interpretation of this Order. It is true that under rule 3 of the Defence of India Rules the General Clauses Act of 1887 shall apply to the interpretation of those rules so far as it applies to the interpretation of a Central Act. Now the rules to which they are said to apply are the Defence of India Rules, whereas the Newspaper Control Order is not a rule made under the Defence of India Act. But then even if the General Clauses Act shall not apply to the interpretation of the Newspaper Control Order by reason of section 3 of the Defence of India Rules, still the General Clauses Act could be looked into as a rule of prudence in the interpretation of these rules.

---

* Crl. Appeal No. 162 of 1945. 22nd August, 1945.

My attention has not been drawn to any provision of law governing the interpretation of the Newspaper Control Order. In the absence of any legislative enactment, Courts have to apply principles of equity and good conscience analogous to the principles of the General Clauses Act. The printing and publishing of newspapers during the weeks ending 25th June, 1944 and 2nd July, 1944, containing 28 and 32 pages respectively became an offence at the end of each of those two weeks when the newspapers were published with the number of pages mentioned above. There can be no doubt that the appellant was guilty of having committed offences under the Newspaper Control Order of 1942 on those dates.

The prosecution in this case was laid only on 28th October, 1944. By that time the Newspaper Control Order of 1942 had been superseded and a new Order had been promulgated under which the act of the appellant would not constitute an offence. In the order of 1944 which superseded the old Order, there is no express saving clause as regards the offences already committed under the previous order which was repealed. The question for consideration is whether by the supersession of the old Order by the new one containing no provision as regards acts done prior to the passing of the new Order, in respect of which offences had been committed under the old Order, no prosecution could be laid in respect of those acts. The question whether a particular act amounts to an offence or not is a matter to be considered with reference to the substantive law on the date on which the offence was committed. The question for consideration is, where an offence was committed under an Act which is superseded and which is not an offence under the superseding Act, the offender ceases to be liable to be prosecuted by reason of the repealing of the previous Act, when there is no saving clause in the subsequent Act with reference to offences already committed.

Section 6 of the General Clauses Act provides as follows :

"Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not . . . . (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation has not been passed."

As already stated above, the provisions of the General Clauses Act though they do not apply as such can be looked into as a rule of prudence, in dealing with a question of interpretation of the kind raised by the defence in the case. The Newspaper Control Order of 1944 is no doubt a superseding order. It does not contain any provision that there shall be no prosecution for offences already committed under the order which was superseded ; nor has the superseding order made any provision in respect of such offences already committed under the order which was superseded.

In *Benoari Lal* v. *Emperor*[1] the question as to what were the rules governing the interpretation of a Letters Patent which was not a statute was discussed, and it was pointed out that though the Letters Patent is not an Act it should be construed in the same way as an Act and that even if the Interpretation Act did not apply in terms to the Letters Patent, the principles underlying the Interpretation Act should be applied in construing the Letters Patent. The principle enunciated in the above case could be applied to the facts of this case, and applying the same, I find that in the absence of any provision in the Newspaper Control Order of 1944 in respect of acts which are offences under the superseded order and which have become offence liable to be proceeded against the offender could be proceeded against and punished as if the old order had been in force in respect of those particular offences. In the view taken by me, it is unnecessary to refer to the other cases cited before me. If the principles under the General Clauses Act still apply as a general rule of law, the Magistrate was justified in having convicted the appellant inasmuch as the offences were completed the moment they were committed and the mere fact that

1. A.I.R. 1943 Cal. 285.

in the superseding Act this was not made an offence would not help the accused. I therefore confirm the convictions.

With regard to the sentence, I think it is excessive. By printing some more pages than what he ought to, he has given more to his subscribers than what he had to, and he was the loser by that act. Also it was only under a mistaken impression that a week must be counted only as six days he seems to have published a few more pages than he ought to. The very fact that in the superseding enactment it is not thought necessary to put any limit on the number of pages to be printed goes to show that this is only a technical offence. This is not a case for imposing such a severe sentence. Further it is long after the offence was committed that this prosecution was started. This is not the only paper that committed this error. Other papers have also published similarly taking a week to be six days. In these circumstances, a nominal sentence will meet the ends of justice. I therefore reduce the sentence to a fine of Re. 1 in respect of each count.

K.S. ——— *Conviction confirmed but sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE KUNHI RAMAN.

S. Ranganatha Iyer .. *Plaintiff**

v.

The Indo Union Assurance Co., Ltd. .. *Defendant.*

Contract—Appointment of chief agent of insurance company for a period of ten years certain—If implies a term on the part of the company to carry on it business for that period—Running of the business of the company as a "closed fund" owing to its financial condition—Termination of services of chief agent—If breach of contract entitling him to claim damages for being prevented from earning his remuneration.

A contract between *X* an insurance company and *Y* appointing *Y* as a chief agent provided *inter alia* as follows: "The nature of your appointment as chief agent shall be for a period of ten years certain. You shall not be removed in the meanwhile for any reason whatsoever except for reason of fraud, misappropriation of funds or for your presentation of a petition for adjudication as an insolvent or failure to fulfil the annual progressive guarantee of premium income". Shortly after, it was found that the company was barely solvent and unable to raise the requisite fresh capital to make up the deficiency. In the circumstances, another insurance company acquired the majority of the shares in the *X* company and decided to run the business of *X* company as a "closed fund" and stop taking any new business. The agency of *Y* was also terminated. In a suit filed by *Y* for damages for wrongful termination of his agency,

Held, that the Court will not in the absence of express words or sufficient indication in the contract, imply a term on the part of the *X* company to continue to carry on its business for ten years for the purpose of enabling *Y* to earn his commission by discharging his duty as chief agent. The whole contract depended on the *X* company being able to work as an active insurance company for ten years. The decision to run the *X* company as a "closed fund" having been taken *bona fide* there was no breach of contract which would entitle *Y* to claim any damages.

Shivlal Mulchand v. *Manekji Mancherji,* (1929) I.L.R. 54 Bom. 510; *Northey* v. *Trevillion,* (1902) 7 Com. Cases 201 and *Rhodes* v. *Forwood,* (1876) 1 A.C. 256, relied on. *Turner* v. *Goldsmith,* (1891) 1 Q.B. 544, distinguished.

Suit for damages for alleged breach of contract.

M. S. Venkatarama Iyer for Plaintiff.

V. K. Thiruvenkatachari, N. V. B. Sankara Rao and *G. Vasantha Pai* for Defendant.

The Court delivered the following

JUDGMENT.—The plaintiff, in response to his application for the post, was appointed as Chief Agent of the defendant Insurance Company for a period of 10 years commencing from the 2nd May, 1943. There was a stipulation in the contract of employment that a guarantee should be given by the plaintiff in respect of the volume of work that he would secure. During the course of the plaintiff's employment, there was transfer of management of the defendant company to the

*C.S. No. 183 of 1944. 21st March, 1945.

Prithvi Insurance Co., Ltd., who had purchased a number of shares of the defendant company. This was necessitated by the financial state of the defendant. After the Prithvi Insurance Co. had thus obtained control of the defendant company, it was decided that the latter should run its business as a "closed fund". As a consequence, notices were issued by the new management to all the agents and sub-agents of the defendant company on the 30th November, 1943, asking them to stop taking new business from the 15th December, 1943, and also terminating the agencies. A letter to that effect was sent to the plaintiff on the 3rd December, 1943, and in this the plaintiff was also offered an appointment in the Prithvi Insurance Co., Ltd. He was not willing to accept this offer. He pleads that the termination of his service amounts to a breach of contract by the defendant company. He brought this to the notice of the defendant company by his letter, dated 26th January, 1944, in which he claimed compensation for wrongful termination of the contract of service. Thereupon, the defendant offered to keep the contract open and called upon the plaintiff to fulfil his undertaking already given in respect of the volume of business to be acquired through his agency. The plaintiff states that since the contract had been terminated before this letter was despatched, it was not open to the defendant to revive the contract with the alleged ulterior motive of demonstrating that the plaintiff was in the wrong. He states that he was prevented from earning his remuneration as a result of the unlawful conduct of the new management of the defendant company. According to him, had the contract been kept open and had he been permitted to discharge his duty as chief agent, he would have earned Rs. 50,000, and this the defendant company has prevented him from earning. He estimates the loss caused to him by reason of the breach of contract on the part of the defendant at Rs. 35,000. In the plaint, however, he has claimed only Rs. 30,000 in respect of this part of the cause of action. He also alleges that he is entitled to have an account taken of the commission already earned by him in the defendant company before his services were terminated. This, according to him, would amount to Rs. 1,000. He asks for a decree for Rs. 31,000 or such other amount as may be fixed by this Court and for costs.

The defendant company raises the following pleas in its written statement. The valuation report of the defendant company made on the 23rd December, 1942, disclosed a deficit of over Rs. 49,000. Thereupon, the Superintendent of Insurance intimated to the company that its account showed that it was barely solvent and that therefore the interests of the policy holders would be in danger, unless fresh capital in cash was raised. This advice was not acted upon, with the result that the Superintendent of Insurance threatened to take action under section 53 of the Insurance Act, 1938. At that stage, the Prithvi Insurance Co., Ltd., acquired a majority of shares of the defendant company. On making an examination of the affairs of the defendant company, it was decided that the proper method of safeguarding the interests of the policy holders would be to run the business of the defendant as a "closed fund". The Prithvi Insurance Company accordingly intimated to the Superintendent of Insurance of their decision. This met with the approval of that officer and he consequently dropped taking further action against the company. The decision arrived at by the defendant company to stop new business obviously meant drastic reduction in the agencies. The defendant pleads that the plaintiff's contract of employment does not imply any promise on the part of the defendant company that it would continue to transact fresh business. Such a term is not in the contract and it would be quite inconsistent with the nature and scope of Insurance business. The defendant also pleads that the plaintiff was not in a position to fulfil the guarantee given by him and for that reason his agreement is liable to be terminated. Of the 14 agents appointed by the plaintiff, only 5 did any work and the total premium income derived from the business secured by them fell short of the proportionate guaranteed amount. In view of the financial condition of the defendant company, the plaintiff would not have canvassed policies for the defendant to any substantial extent. The

defendant therefore denies liability to pay damages to the plaintiff and pleads also that the amount claimed is grossly exaggerated. Dealing with the offer to appoint the plaintiff in the Prithvi Insurance Company, Ltd., the defendant pleads that had the plaintiff accepted the offer, it would have brought him a higher income than what he could have earned under the suit contract. The defendant points out that a number of its chief agents and agents had chosen to accept similar terms offered to them by the Prithvi Insurance Co., Ltd. With regard to the sum of Rs. 1,000 claimed in the plaint as representing commission already earned by the plaintiff before his services were terminated, the defendant pleads that had the plaintiff applied for payment of what was due to him, he would have got it without difficulty, but he had not chosen to claim it until the suit was filed.

On these pleadings the following issues were framed:—

1. Has the defendant committed breach of the contract, dated 2nd May, 1943?
2. To what damages, if any, is the plaintiff entitled?
3. To what reliefs are the parties entitled?

The plaintiff's complaint is that since he was appointed as chief agent of the defendant company for a period of 10 years, the defendant was bound to continue its business for that period and that the stopping of business by the defendant company after a majority of its shares were acquired by the Prithvi Insurance Co. amounted to a breach of contract. The defendant's answer to this contention is that on a proper construction of its contract with the plaintiff, it cannot be contended that there was a duty imposed upon the defendant to continue its business for a period of ten years to entitle the plaintiff to enjoy the benefit of his appointment. According to the defendant, the business of the company was stopped for valid reasons as a result of criticism of its financial condition by the Superintendent of Insurance, who was competent to make that criticism on the strength of the reports published by the defendant. The majority of the shares of the defendant was taken over by the Prithvi. The defendant thus became a subsidiary company to the Prithvi. On a scrutiny of the financial condition of the defendant company, it was then felt that the proper course to adopt would be to continue the defendant company as a "closed fund". The idea was that no fresh insurance business should be accepted by the defendant, but that it should go on functioning only in respect of the insurance business which was already secured before it became subsidiary to the Prithvi. This naturally meant stopping fresh work being done by the chief agents and agents. Such procedure, according to the defendant, was legitimate and could not give the plaintiff a cause of action. It is also contended that after the plaintiff's services were determined by notice, the plaintiff was offered an equally profitable agency as chief agent of the Prithvi. From the point of view of the remuneration which was likely to be earned by the plaintiff, this new appointment offered to him was as good as the appointment under the defendant company, which was terminated by notice. Since the plaintiff did not choose to accept this offer, even if it is found that the defendant had committed a breach of contract, the plaintiff would be entitled only to nominal damages.

The first question for determination turns upon the construction of the contract of chief agency between the plaintiff and the defendant. This contract is to be found in two letters Exhibit P-1, dated 2nd May, 1943, which contains the terms of the appointment and Exhibit P-2, dated 3rd May, 1943, which is the acceptance of those terms by the plaintiff. In Exhibit P-1, which was sent in response to plaintiff's application for the post, the defendant company informed the plaintiff that he was appointed chief agent from 15th April, 1943, subject to certain terms and conditions enumerated in the letter. These authorised the plaintiff to engage agents, organisers, inspectors and superintendents for the purpose of securing Insurance business within the whole of the Presidency of Madras, which was the area allotted to the plaintiff. Reference was then made

to a guarantee which was to be given by the Plaintiff in respect of the quantum of business to be secured by him year after year. The next clause referred to the commission payable to the plaintiff on the business secured by him which was inclusive of the remuneration which he would have to pay to his employees. The method of payment of the commission earned by the plaintiff was then referred to and incidentally reference was also made to the doctor's fees payable on examination of persons who send proposals for insurance to the defendant company. Clause 5 of the letter is important and may be read in full. It is as follows:

"The tenure of your appointment as chief agent shall be for a period of 10 years certain. You shall not be removed in the meanwhile for any reason whatsoever except for reasons of fraud, misappropriation of funds or for your presentation of a petition for adjudication as an insolvent or failure to fulfil the annual progressive guarantee of premium income."

It is not necessary to refer to the remaining clauses of this letter which deal with other details concerning the chief agency.

The question therefore is, What is the proper construction to be put upon clause 5 of Exhibit P-1? Since the plaintiff was informed that the tenure of his appointment as chief agent would be for a period of 10 years certain, can he complain of a breach of contract because his services were terminated before the expiry of this period? The fundamental principles involved in a case of this description arose for consideration in *Shivlal Mulchand* v. *Manekji Mancherji*[1]. All the relevant English decisions, which may be regarded as leading cases on the subject, are discussed in the judgments of the two learned judges who decided this case. In the judgment of the learned Chief Justice (Marten, C.J.), reference is made to the rule of construction of a contract like the present. The following observations of Kay, L.J., in *Hamlyn & Co.* v. *Wood & Co.*,[2] are quoted:

"I agree with the rule as laid down by the Master of the Rolls, *viz.*, that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied. To state the rule in any wider terms would be going, I think, beyond what is justifiable on principle."

The facts of that English case are then referred to. That was a case where the defendants who were brewers had agreed to sell all their grain to the plaintiffs. Subsequently, the defendants sold their business and the question was whether they had committed a breach of the contract. It was held that from the contract, a term could not be implied to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of the grain to the plaintiff for the period mentioned in the contract.

Another English case which is referred to in the judgment of Blackwell, J., in the Bombay case is *Lazarus* v. *Cairn Line of Steamships, Ltd.*[3] Mr. Justice Scrutton in his judgment in that case summarised the principles that can be gathered from the leading English cases on the point and two of the principles so laid down, which are relevant to the present case, are the following:—

"1. Where there is a principal subject-matter in the power of one of the parties, and an accessory or subordinate benefit arising by contract out of its existence to the other party, the Court will not, in the absence of express words, imply a term that the subject-matter shall be kept in existence merely in order to provide the subordinate or accessory benefit to the other party.

2. But where there is an express term requiring the continuance of the principal subject-matter or giving the plaintiff a right to a continuing benefit, the Courts will not imply a condition that the plaintiff's right in this respect shall cease on certain events not expressly provided for."

The question then is whether the facts of this case will bring it within the purview of the first or the second of these classes of cases; in other words, was there an obligation on the part of the defendant to continue to carry on its

1. (1929) I.L.R. 54 Bom. 510.
2. (1891) 2 Q.B. 488.
3. (1912) 106 L.T. 378.

business for ten years for the purpose of enabling the plaintiff to earn his commission by discharging his duty as chief agent? If, for *bona fide* reasons, the defendant had of necessity to stop functioning actively as an insurance company, can that give a cause of action to the plaintiff to claim damages for the reason that such conduct on the part of the defendant deprived him of the benefit that he would otherwise have derived under the contract of chief agency? The relevant part of the contract between the two parties has already been read. In that contract, there is no express stipulation to the effect that the defendant would continue to carry on active business of the insurance company for the full period of ten years for which the plaintiff was appointed as chief agent. Consequently, the decision of the defendant to function as a "closed fund" did not amount to breach of an express contract. The contract stated that the plaintiff would not be removed for any reason whatsoever except for reasons of fraud, misappropriation of funds, insolvency or failure to fulfil the guarantee that he gave with regard to the quantum of business to be secured by him as chief agent. Can this part of the contract be regarded as containing an implied term that the defendant undertook to carry on active business for the full period of ten years? On a careful scrutiny of the contract as a whole and especially of the two relevant terms adverted to, the inference that can be drawn, in my view, is that the whole contract depended upon the defendant being able to work as an active insurance company for ten years. There was no undertaking or promise given by the defendant that the company would work for that period. If the company did not work for that period, but had to stop active work for *bona fide* reasons, then the plaintiff cannot take the defendant to task and plead that a breach of contract was committed; in other words, the case is covered by the observations of Kay, L.J., in *Hamlyn & Co.* v. *Wood & Co.*,[1] in which the rule laid down by the Master of the Rolls was adopted namely, that the Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question, that the Court is necessarily driven to the conclusion that it must be implied. In my judgment, the circumstances and the facts of this case do not warrant such a term and it cannot therefore be implied.

At first sight there seems to be an apparent conflict between the view taken in *Rhodes* v. *Forwood*[2], the facts of which are very similar to the present case and the decision in *Turner* v. *Goldsmith*[3], where the facts appear to be somewhat similar, but where a different conclusion was arrived at. The distinction between the two cases was considered by Phillimore, J., in his judgment in *Northey* v. *Trevillion*[4] where it was stated as follows:—

"The distinction seems to be that if it is a mere contract of agency with no service or subordination, the Court will hold that there is no implied contract that the agent is to be supplied with the means of earning his commission. If the contract is one of service then the commission is merely intended to be instead of salary, and the contract cannot be determined without compensation."

This was adopted by Blackwell, J., in his judgment in the case reported in *Shivlal Mulchand* v. *Manekji Mancherji*[5]. In the present case the terms of the contract entered into between the plaintiff and the defendant indicate that there was merely a contract of agency and there was no "service or subordination". The plaintiff is a highly influential man who has shares in lucrative concerns and who is himself in very affluent circumstances. Because of his status and financial condition, the defendant entered into a contract of agency with him. There does not appear to be any contract of service or subordination so far as the plaintiff is concerned. Therefore the facts of the present case are similar to the facts in *Rhodes* v. *Forwood*[2] and not those in *Turner* v. *Goldsmith*.[3]

1. (1891) 2 Q.B. 488.
2. (1876) 1 A.C. 256.
3. (1891) 1 Q.B. 544.
4. (1902) 7 Com. Cases. 201.
5. (1929) I.L.R. 54 Bom. 510.

The reason why the Prithvi Insurance Co. was approached for purchasing a large number of shares in the defendant company has been clearly explained in the evidence of the witnesses examined on behalf of the defendant. The Superintendent of Insurance, on a scrutiny of the report of progress of the defendant company, had valid reasons for objecting to its continuing to do active business as before. Certain courses were suggested by him. The defendant company approached the United India Life Assurance Co. The latter company, on taking expert advice, was not willing to take it up. Then the Prithvi Insurance Co. came to the relief of the defendant company and took over a large number of shares which reduced the defendant company to the position of a subsidiary company to the Prithvi Insurance Co. The evidence of D.W. 1, T. S. Swaminathan who has got technical qualifications to pronounce an opinion on the subject, is that he was consulted and that it was he who advised the Prithvi Insurance Company to run the defendant company as a "closed fund." He also said that he did not advise the United India Insurance Co. to take up the defendant company. The evidence shows that in November, 1943, there was a deficit of Rs. 49,000 and the decision reached by the Prithvi Insurance Company after taking expert opinion was to adopt the course already referred to. It is stated on behalf of the defendant company that even now the plaintiff will be getting his commission earned on insurance already effected by him, as and when the insured pay their premiums. It was decided that no fresh insurance business should be transacted. The evidence shows clearly that the decision to run the defendant company as a "closed fund" was taken after obtaining the opinion of qualified experts, that it was a *bona fide* decision and not one made with the sinister object of bringing an unfair advantage to the Prithvi Insurance Co., or of putting the plaintiff to any loss.

1st issue: In view of these circumstances, my finding on the first issue is in the negative.

2nd issue: The next question is about damages. On my finding on the first issue, the plaintiff is not entitled to any damages, but the question as to whether there are other circumstances which would disentitle the plaintiff to damages even if it is assumed that the defendant had committed a breach of contract, must now be considered. The Prithvi Insurance Co. made offers to all the agents working for the defendant company, similar agencies in that company. Most of them accepted. But the plaintiff refused the offer. The offer was to pay him commission at the rate of 7½ per cent. on the business secured. The plaintiff's learned advocate states that under the plaintiff's agreement with the defendant company, he was entitled to commission at 10 per cent. on the renewal policies, and he therefore states that he was not offered equally advantageous terms by the Prithvi Insurance Co. But what is urged on behalf of the Prithvi Insurance Company is that it is a more successful company than the defendant company and that there is a possibility of a larger volume of business being secured by an agent of the Prithvi Insurance Company than by an agent of the defendant company. Thus, the plaintiff would not have sustained any detriment whatsoever; on the other hand he would have been benefited had he accepted the agency of the Prithvi Insurance Company. There is certainly a difference in the rate of commission offered to the plaintiff; it was 2½ per cent. lower than the rate of commission that he was entitled to under his contract with the defendant company. But that will be a minor factor. There is substance in the defendant's advocate's contention that the damages to which the plaintiff will be entitled will in any event be nominal. But in view of my finding on the first issue, my finding on the second issue is that the plaintiff is not entitled to any damages.

There remains only one other minor point for consideration. The plaintiff has claimed Rs. 1,000 as the amount of commission earned by him before the defendant decided to run its business as a "closed fund". On this point the evidence is that in response to the claim of the plaintiff, the defendant sent a statement showing a lower amount (Rs. 326-10-0). But the plaintiff has not yet

scrutinised that statement nor has he replied admitting or denying the correctness of the figure mentioned in Exhibit D. 3. In the circumstances, in the interests of both the parties the point about the actual amount payable to the plaintiff in respect of this item is left open. But the defendant has admitted clearly that the plaintiff is in any event entitled to commission earned by him in respect of business already secured by him and to renewal commission in future in respect of that business. The parties have not yet come to an agreement as to the exact amount that is payable to the plaintiff. That is a matter that parties agree to look into and decide for themselves, and if the plaintiff is entitled to an amount higher than what is conceded by the defendant, it is open to him to claim it.

Since the plaintiff has substantially failed in this action the suit is dismissed with costs.

K.S. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT, AND MR. JUSTICE YAHYA ALI.

Palani Vannan and others .. *Appellants**

v.

Krishnaswami Konar and others .. *Respondents.*

Deed—Construction—Power of attorney—Agency coupled with interest—Revocation of power—Breach of agreement—Action for damages—Maintainability—Contract Act (IX of 1872), section 202.

A power-of-attorney whereby an assignee-decree-holder authorised the agent to execute the decree provided as follows:

"You shall yourself bear the cost of executing the said decree, and, if money has to be realised by filing a suit against the said *S* the cost of filing the suit also. We shall take accounts at the end, take the amount of cost due to you out of the amount realised and you shall take one half and I the other half of the amount that remains. As in respect of the said amounts having to be realised by me in respect of the said decree amount and in respect of my having obtained assignment I have made you to incur expenditure and take trouble and realise, I shall not in respect of the said documents, receive without your permission any amount from any person in any manner, either amicably or through Court. Nor will I do anything opposed to the steps taken by you.........I shall not for any reason whatever cancel without your permission this authority which I have given to you without paying the amount expended by you and without giving the aforesaid relief for your trouble".

Held, that the document did not create an agency coupled with interest such as is contemplated by section 202 of the Contract Act and that it was not on that account irrevocable.

Held further, that an action for breach of contract of the agreement under the deed could be maintained by the agent against the principal.

Appeal against the order of the Court of the Subordinate Judge, Trichinopoly, dated 16th October, 1943 in E. P. No. 357 of 1942 in O. S. No. 37 of 1935.

R. Rangachari for Appellants.

T. V. Muthukrishna Aiyar and *L. A. Gopalakrishna Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS: *Mockett, J.*—This appeal can be dealt with very briefly because it raises a short but interesting question of construction and its decision depends on the view I take of the construction of a single document. The short facts are as follows: There was a preliminary decree in a mortgage suit, dated the 14th March, 1936 in favour of one Sethu Madhava Rao against, amongst others, the present appellants. There was a final decree in August, 1936. On the 25th July, 1937 the decree was assigned by Sethu Madhava Rao to one Govinda Konan. On the 19th July, 1939, Govinda Konan executed a power of attorney, Ex. D-1 to one Vedavyasachar, authorising him to execute the decree. On the 3rd February, 1941, Govinda Konan assigned the decree to Krishnaswami Konar, the present first respondent. On the 6th March 1941, by Ex. P-3, Govinda Konan sent a notice to the judgment debtors and to Vedavyasachar revoking the power of at-

---

*A.A.O. No. 152 of 1944. 22nd March, 1945.

torney. The execution petition before the lower Court was to recognise the assignment, dated 3rd February, 1941 by Govinda Konan. It should be added that on the 10th and 11th July, 1942 there was a compromise between Vedavyasachar and the appellants. The question that arises in this appeal is, was the notice, Ex. P-3, effective?

It is argued for the appellants that it is not, by reason of the fact that the power of attorney Ex. D-1 is irrevocable, it being a power of attorney creating an agency coupled with an interest under section 202 of the Contract Act. We have had the advantage of most interesting arguments from both the learned Counsel who have appeared for the parties. There is no difficulty with regard to the law. It would seem beyond doubt that the section does no more than state the effect of the English decisions under common law. So long ago as 1866, Couch, C.J., stated the legal position with regard to these powers of attorney. He said in *Hurst* v. *Watson*[1],

"Where an authority or power is coupled with an interest, it is irrevocable, unless there is an express stipulation to the contrary; but the right of the agent to remuneration, although stipulated for in the form of part of the property to be produced by the exercise of the power, is not an interest in this sense."

I think the learned Chief Justice when making those remarks must have had in mind the decision in *Smart* v. *Sandars*,[2] which is one of the sources of the law relating to this topic. Wilde, C. J. observes as follows—

"But, it is said, a factor for sale has an authority as such (in the absence of all special orders) to sell; and, when he afterwards comes under advances, he thereby acquires an interest; and, having thus an authority and an interest the authority becomes thereby irrevocable. The doctrine here implied, that, whenever there is in the same person an authority and an interest, the authority is irrevocable, is not to be admitted without qualification."

It is only necessary to refer to one further decision, *Frith* v. *Frith*[3] in which the Judicial Committee discuss the general position relating to these matters. Their Lordships point out that in what is known as *Carmichael's case*.[4]

"The donor of the power, for valuable consideration, conferred upon the donee, authority to do a particular thing in which the latter had an interest, namely, to apply for the shares of the company, which the donee was promoting for the purpose of purchasing his own property from him, and the donor sought to revoke that authority before the benefit was reaped."

The effect of all these cases appears to be stated accurately in Bowstead on the Law of Agency, 8th edition, page 456. It is stated (Art. 138)—

"Where the authority of an agent is given . . . for the purpose of effectuating any security, or of protecting or securing any interest of the agent, it is irrevocable during the subsistence of such security or interest."

It will be found in all the cases that that is the test when deciding whether an authority is irrevocable or not.

I have only then to apply these principles to the present power of attorney, Ex. D-1. The important words are, after referring to the decree—

"You shall yourself bear the cost of executing the said decree, and, if money has to be realised by filing a suit against the said Sethu Madhava Rao the cost of filing that suit also. We shall take accounts at the end, take the amount of cost due to you out of the amount realised and you shall take one half and I the other half of the amount that remains. As in respect of the said amounts having to be realised by me, in respect of the said decree amount and in respect of my having obtained assignment I have made you to incur expenditure and take trouble and realise, I shall not in respect of the said documents receive without your permission any amount from any person, in any manner, either amicably or through Court. Nor will I do anything opposed to the steps taken by you."

Then follows a very important concluding sentence:

"I shall not for any reason whatever, cancel without your permission this authority which I have given to you, without paying the amount expended by you and without giving the aforesaid relief for your trouble."

My view of the document is as follows: I think its primary object was to recover on behalf of the principal the fruits of his decree. It contained incidentally a provision for the employment of the agent, Vedavyasachar, in order to realise

1. (1866) 2 Bom.H.C.R. 400 at page 403.
2. (1848) 5 C.B. 895.
3. (1906) A.C. 254 at page 260.
4. (1896) 2 Ch. 643.

that decree. It provides that his remuneration is to be one-half of the proceeds. It contains an indemnity clause against any out of pocket expenses which he is entitled also to recover from the amount of the decree. But the object of the power of attorney is not for the purpose of protecting or securing any interest of the agent. I think that part of the agreement is purely incidental. There is, however, another feature of this document which seems to me to be conclusive against the appellant. The last words "I shall not for any reason whatsoever, cancel without your permission this authority which I have given to you, without paying the amount expended by you and without giving the aforesaid relief for your trouble" seem to me to make express provision for the revocation of the above power. It can be done in two ways, (a) by consent, for that is what I understand "your permission" to mean, and (b) if that permission is withheld, on payment by the principal of all out of pockets and also remuneration for his services. With regard to remuneration, the wording is vague "without giving the aforesaid relief for your trouble."

I have no doubt that an action for breach of contract of this agreement would lie by Vedavyasachar against Govinda Konan. Whether it will succeed or not is another matter, but for the reasons which I have given, I am quite satisfied that this is not such an agency coupled with interest as is contemplated by the Contract Act. I have not referred to the many cases cited, as I think that those to which I have referred amply support the position contended for by the respondents. I will, therefore, dismiss the appeal with costs.

Yahya Ali, J.—I agree.

R.V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Musali Ammal .. *Appellant**

v.

K. E. Chellaperumal Mudaliar and another .. *Respondents.*

Mortgage—Two mortgages—Sale in execution of prior mortgage—Setting aside—Suit to enforce later mortgage—Money advanced to set aside sale—Equity in favour of person advancing—Civil Procedure Code (V of 1908), Order 21, rule 89.

The suit mortgage was executed by the first defendant and by the father of defendants 2 to 5 in favour of plaintiffs-respondents. There was an earlier mortgage of the same property effected by the mortgagors in favour of another person. That mortgagee's assignee filed a suit, obtained a decree and brought the properties to sale in execution of that decree, and a third party purchased the property. Before the sale was confirmed items 1 and 2 covered by the suit mortgage were sold to the vendor of the sixth defendant, the present appellant, and with the money so raised the mortgagors made a deposit under O. 21, rule 89, Civil Procedure Code, and got the sale set aside. The sixth defendant subsequently purchased the property from his vendor. The plaintiffs claimed a mortgage decree over all the items on the ground that the purchase by the 6th defendant's vendor and the purchase by the seventh defendant of item 3 were all subsequent to the mortgage in their favour. The defence was that there were some equities in favour of the sixth defendant in as much as his vendor's money went for the setting aside of the sale under O. 21, rule 89 of the Code.

Held, that the purchase in execution of the prior mortgage decree having been set aside, there was no reason for denying the plaintiffs the right which they claimed against the suit properties.

Held further, that in the absence of a registered deed no right of subrogation could be pleaded by reason of the money advanced by the appellant's vendor having been utilised by the mortgagor for action under O. 21, rule 89 of the Code.

Appeal against the decree of the District Court, Chingleput, in A.S. No. 214 of 1943 preferred against the decree of the Court of the District Munsiff, Conjeeveram in O. S. No. 384 of 1942.

S. Ramanathan for Appellant.

T. E. Ramabhadrachariar for Respondents.

The Court delivered the following

---

*S.A. No. 263 of 1945. 25th April, 1945.

JUDGMENT.—The suit out of which this second appeal arises was filed by the plaintiffs-respondents for the recovery of a sum of Rs. 800 said to be due on a mortgage, Ex. P-1, dated the 19th June, 1927. This was executed by the first defendant and by the father of defendants 2 to 5. There was an earlier mortgage of the suit property effected by the mortgagors in favour of one Muniswami Mudaliar. That mortgagee's assignee filed O. S. No. 261 of 1931, obtained a decree and brought the properties to sale in execution of that mortgage decree. One Muniswami Naicker became the purchaser. Before the sale was confirmed, items 1 and 2 covered by the suit mortgage which are Survey Nos. 80 and 81 were sold to the vendor of the sixth defendant who is the appellant in this second appeal and with the money raised under that sale deed the mortgagors made a deposit under O. 21, rule 89 of the Civil Procedure Code and got the sale set aside. The sixth defendant subsequently purchased the property from his vendor. The plaintiffs claim a mortgage decree over all the items on the ground that the purchase by the sixth defendant's vendor and the purchase by the seventh defendant of item 3 were all subsequent to the mortgage in their favour. The defence is that there are some equities in favour of the sixth defendant inasmuch his vendor's money went for the setting aside of the sale under O. 21, rule 89. The argument is also put thus: the plaintiffs were parties to the previous mortgagee's suit of 1931. They were bound by that decree. In execution of that decree the properties were sold away and purchased by a third party. Therefore the plaintiffs have no right to claim priority over that purchaser. There is nothing to be said against the argument so far. But the trouble is the appellant has not acquired that purchaser's rights and what is more, the Court auction at which a third party became the purchaser was subsequently set aside at the instance of the mortgagor under O. 21, rule 89. The law undoubtedly is that the plaintiff would have had no right if only the auction sale held in pursuance of the prior mortgagee's decree had not been set aside. As against the purchaser in execution of the mortgage decree the present plaintiffs would have no claim. But there the matter ends. Since the purchase has been set aside, the plaintiffs have a right of proceeding against the mortgaged properties. The purchase in execution of the prior mortgage decree not being in the way of the plaintiffs, there is no reason for denying the plaintiffs the right which they claim against the suit properties. Viewed from the standpoint of the money advanced by the appellant's vendor having been utilised by the mortgagor for action under O. 21, rule 89, the difficulty is that after the Transfer of Property Act was amended in 1930 a right of subrogation can be recognised only if there is a registered instrument by the mortgagor giving this right of subrogation to the person who advanced money to the mortgagor for the purpose of enabling the mortgagor to pay off an earlier mortgage. It is no doubt true that the plaintiffs have gained an advantage which they would not have got if the prior purchase had not been set aside. The learned advocate for the appellant has drawn my attention to the decision of Ramesam and Jackson, JJ. in *Ramaswami Pillai v. Narayanaswami Pillai*.[1] But the proposition stated there is only that a subsequent mortgagee who is made a party to the prior mortgagee's suit is not entitled to any rights as against the purchaser in execution of the prior mortgagee's decree. But that decision is no authority for the proposition that if the sale in execution of the prior mortgagee's decree is set aside, the second mortgagee would not be entitled to the rights under his mortgage. If the argument of the learned advocate for the appellant is accepted, the plaintiffs should have no right whatever. According to him, the plaintiff's rights became extinguished as against the items which were sold away in court-auction. But I cannot accede to this proposition seeing that the auction sale was subsequently set aside.

The suit mortgage comprised four items. Of these items 1 and 2 were purchased by the sixth defendant's vendor and thereafter by the sixth defendant.

1. (1924) 48 M.L.J. 100.

Item 3 was purchased in court-auction by the seventh defendant. There is still another item, a house in Conjeeveram which has not been sold away to any one. This apparently is still in the possession of the mortgagors. There can be no possible objection to a direction that the plaintiffs-respondents should in the first instance proceed against item 4 which has not been subsequently sold to any one and that they can proceed against items 1 to 3 after exhausting their remedies against item 4. This modification will be embodied in the decree.

Subject to this modification the decree of the lower appellate Court is confirmed and the second appeal is dismissed with costs. Time for payment is extended till the 15th July, 1945.

B.V.V. — *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Sisili Ammal and others .. *Appellants**

v.

I. S. Sundararaja Naidu and others .. *Respondents.*

Crown Grants Act (XV of 1895), section 2—Crown grant—Construction—Confirming to grantee and his heirs as shrotrium *a village which was to be "not alienable by gift, sale or otherwise, but in default of legal heirs" to revert to grantors—Validity of condition—Nature of interest created—Alienation—Right of successors of alienor to avoid.*

A grant of a village on the part of the East India Company as a *shrotrium* concluded with the following clauses :—

"* * * * * * * *

(4) The Governor in Council confirms to you and your heirs the village of Errongaud Cottah as *shrotrium* so long as you discharge the rent and are obedient to the laws and regulations established or to be established, under the authority of the Governor in Council for the time being.

(5) In confirming to you and your heirs as *shrotrium* the village of Errongaud Cottah, you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Hon'ble Company."

One of the successors of the grantee having died after creating a usufructuary mortgage over the village, on a question as to the validity and binding nature of the mortgage on the successors of the mortgagor,

Held, that (*i*) the grant being a Crown grant governed by the Crown Grants Act, the condition in *clause* (5) is perfectly valid, though such a condition will be invalid if the grant was made by a private individual.

(*ii*) If the document had ended with *clause* (4) the estate created would not be anything other than an absolute estate of fee simple. The clause against alienation contained in *clause* (5) would not make the estate created one of a series of life estates. Reverter to the donor or his heirs on failure of the heirs of the grantee does not prevent an alienation and the alienee would be entitled to enjoy the property, at any rate, as long as the line of the grantee continues.

Gulabdas Jugjivandas v. *The Collector of Surat*, (1878) L.R. 6 I.A. 54 : I.L.R. 3 Bom. 186 (P.C.) and *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank*, (1931) 61 M.L.J. 208 : L.R. 58 I.A. 215 : I.L.R. 59 Cal. 1 (P.C.), distinguished. *Sundararajulu Naidu* v. *Papaiah Naidu*, (1938) 1 M.L.J. 686 : I.L.R. 1938 Mad. 767, dissented from.

(*iii*) The effect of an alienation is not merely to enable the grantor to resume on failure of legal heirs but also to enable the successors of the alienor to avoid the alienation after his death.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in O. S. No. 13 of 1942, dated 27th July, 1943.

C. Narasimhachariar and *M. E. Rajagopalachari* for Appellants.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—The question raised in these appeals relates to the nature and effect of the grant under the Original of Ex. D-1.

Two suits were filed in the Lower Court, O.S. No. 13 of 1942 and O.S. No. 17 of 1942. The judgment under appeal refers to the array of the parties in the later suit and we shall do the same.

* Appeal No. 170 of 1944, *etc.* and A. A. O. No. 474 of 1944. ... 25th July, 1945.

The plaintiffs in O. S. No. 17 of 1942 filed the suit for a declaration that the usufructuary mortgage held by them under Ex. P-1 over the village of Irungattukottai is valid and binding on the defendants 1 to 5. The mortgagors are the first defendant, second defendant and Sriramulu Naidu, the father of defendants 3, 4 and 5. The other suit O. S. No. 13 of 1942 was filed by the sons of Sriramulu Naidu against the plaintiffs in O. S. No. 17 of 1942 for an account of their one-third share in the income realised from the suit village on the footing that the document executed by their father Sriramulu and his two brothers is not binding on them. The two suits raise substantially the same question. The lower Court decreed O. S. No. 13 of 1942. O. S. No. 17 of 1942 was decreed against defendants 1 and 2 and they do not appeal. It was dismissed against defendants 3 to 5 who are the plaintiffs in the other suit. These appeals are directed against the decrees granting relief to Sriramulu Naidu's sons.

The village in question was held by the ancestors of respondents 1 to 3 under a service tenure referred to as mokhasa tenure, the service being providing the necesary police force for keeping peace and order in the country. The service holders known as palayagars were entitled to hold and enjoy the villages allotted to them so long as they provided the necessary police force. This system was found to be unsatisfactory and was therefore abolished and regular police establishment paid by the Government and working directly under the Government was introduced. As the service was otherwise provided for, the authorities granted the villages till then held on service tenure on certain terms. The grant of the suit village made by the then Governor in Council is evidenced by Ex. D-1. It was granted to one Sriram Singam Naick, the ancestor of respondents 1 to 3. Bhaskarayya Naidu a descendant of Sriram Singam Naick was in possession of the village and he died leaving three sons Sreeramulu Naidu (the father of Respondents 1 to 3), Gopalaswami Naidu and Audikesavalu Naidu who were defendants 1 and 2 in O. S. No. 17 of 1942, but who are not respondents in the appeal against the decree in that suit. The common question that arises in all these appeals is:

"What is the nature of the interest created under the original of Ex. D-1?"

The document is a short one and may be set out in full. It runs thus:

"Puruvannah granted by the Right Honourable Edward Lord Clive Baron Clive of Walcot in the county of Salop, and Baron Plassy of the Kingdom of Ireland, Governor in Council of Ft. St. George, on the part of the Hon'ble the United Company of Merchants of England, trading to the East Indies to Streeram Singam Naick, late a Poligar of the District of Tripassore in the Honourable Company's Jagheer.

Experience having shown that the Police of Jagheer under the charge of the Poligars and Cavilgars has been inadequate to the prevention of crimes, or the apprehension of offenders, the Right Hon'ble the Governor in Council has determined to abolish that system;

To resume the fees appropriated to the support of it; and to introduce a general reform of the Police Department. In consideration of the loss to which persons employed in the system of Police will be in consequence subjected, His Lordship in Council has resolved to compensate that by confirming the villages they formerly held on moccassah tenure, to them, and their heirs on shrotrium tenure.

2. In consequence of the foregoing resolution, the Governor in Council confers on you the village of Errongaud Cottah in the Zamindary of Streeperumbudoor on Shrotrium tenure chargeable with an annual rent of Pagodas 50 (fifty) including Russooms and Marahs, *viz.*:

Shrotrium rent, 5.

(torn)

Pagoda Marah, 11—1/32.

Poligar Marah, 34—3/16.

3. The Governor in Council having commuted the Russooms and Marahs assessable on the village of Errongaud Cottah for money rent, you are entitled to collect these Russooms and Marahs at the rate entered in the dowle of fasli 1210 and to appropriate the amount to your own use.

4. The Goveror in Council confirms to you and your heirs the village of Errongaud Cottah as Shrotrium so long as you discharge the rent and are obedient to the laws and regulations established or to be established, under the authority of the Governor in Council (torn) for the time being;

5. In confirming to you and your heirs as shrotrium the village of Errungaud Cottah, you are to understand that the said village is not alienable by gift, sale or otherwise, but in default of legal heirs, that the said village shall revert to the Hon'ble Company."

The lower Court accepted the respondents' contention that the grant creates a succession of life estates in the grantee and his successors and that the provision

against alienation enures not only for the benefit of the grantor to resume on failure of legal heirs but also enables the successors of an alienor to avoid the alienation and to recover the property after the alienor's death. On the other side the appellants contend that the grant creates an absolute estate of fee simple subject to the condition that on failure of grantee's legal heirs, the grantor is entitled to resume the village free from any alienations that may have been made by the grantee or by any of his successors.

The three brothers became indebted to Papayya Naidu, the father of appellants 1 to 3 and the husband of the fourth appellant. They executed Ex. P-1 to Papayya Naidu on 17th October 1921 to secure a loan of Rupees Twenty thousand. Ex. P-1 is a usufructuary mortgage deed under which the mortgagee is to be in possession and enjoyment of the suit village and appropriate the net income towards the interest payable under Ex. P-1 and on payment of the principal sum the village is to be delivered to the mortagagors. Sreeramulu Naidu died on 30th August, 1932 and troubles arose soon afterwards. Papayya Naidu had obtained a money decree against the three brothers and in execution of that decree he attached the judgment-debtor's interest in the suit village. Objection was taken to the validity of the attachment and the matter was finally decided by this Court. (*Sundararajulu Naidu* v. *Papaiah Naidu*[1].) We shall refer to that decision later. After the termination of those proceedings respondents 1 to 3 the sons of Sreeramulu attempted to interfere with the mortgagee's possession of the village and hence O. S. No. 17 of 1942 was filed by the sons and widow of the original mortgagee for establishing that the mortgage is valid and binding on the surviving mortgagors and on the sons of the deceased mortgagor. The other suit O. S. No. 13 of 1942 was filed by Sreeramulu's sons for recovery of their one-third share in the income realised by the mortgagees after Sreeramulu's death.

The grant under Ex. D-1 is a Crown grant and is governed by the Crown Grants Act. Though a condition such as we have in clause (5) of Ex. D-1 will be invalid if the grant is made by a private individual, it is perfectly valid in the case of a Crown grant. Hence the only question is whether the prohibition against alienation enables the successors of the alienors to aviod the alienation? Or, was it put in only to enable the Crown to resume the property on failure of legal heirs free from any intermediate alienation? This question is not quite free from difficulty. Mr. Narasimhachariar the learned advocate for the appellants emphasises the use of the word " but " between " You are to understand that the said village is not alienable by gift, sale or otherwise " and " in default of legal heirs, that the said village shall revert to the Honourable Company" and urges that this means that the only consequence of the violation contained in the first part of clause (5) is that mentioned in the second part. There is much to be said for this view. It is urged on the other side that the latter part of clause (5) was necessary in order to make it clear that on alienation, the grantor the East India Company was not to resume the grant forthwith but to get it only on the failure of the legal heirs and that otherwise the clause must be given the full effect which flows from its language and that the prohibition being an absolute one an alienation does not bind the successor, at any rate. Another construction of the document is that it created a series of life estates and that an alienation by one life estate holder will not, by the nature of the estate taken by him, enure beyond his life-time.

As said before the question of the construction of Ex. D-1 came up for consideration before the High Court on a former occasion when the appellants' father attached the interests of the mortgagors in execution of a money decree obtained against them during the lifetime of Sreeramulu Naidu. The objection raised on behalf of Sreeramulu Naidu's sons were substantially the same as those put forward

1. (1938) 1 M.L.J. 686 : I.L.R. (1938) Mad. 767.

by them in the present litigatiom. The Subordinate Judge overruled the objections and upheld the attachment. The appeal came on for hearing before Burn and Abdur Rahman JJ. There was a difference of opinion between the two learned Judges. Burn J., held that the view of the lower Court was right and that the creditor had the right of bringing the property to sale. Abdur Rahman J., differed from this view and held that the successors of the alienor were entitled to ignore the alienation taking advantage of this prohibition and that the alienation did not prevent them or their sons from asserting their rights. He therefore directed the release of the one-third share of Sreeramulu's sons and as regards the shares of the other two brothers he directed the appointment of a receiver to realise the profits during their lifetime and to appropriate the income towards the decree obtained by the appellants' father. The appeal was referred for decision by a third Judge and Venkataramana Rao J., who heard the appeal (*Sundararajulu Naidu* v. *Papaiah Naidu*[1],) on such reference took the view that the document created a series of life estates in the holders for the time being and that therefore by the very nature of the estate, the alienation would not enure beyond the lifetime of the alienor. He also took the view that the clause prohibiting alienation enabled the successors of the alienor to recover the property on the death of the alienee. As regards the shares of the other two brothers he agreed with the direction made by Abdur Rahman, J. In this case we are not concerned with the claim against the other two brothers who have acquiesced in the decree granted by the lower Court. We are only concerned with the question whether the mortgage created by Sreeramulu Naidu is binding on his sons. The appellants fail if either of the views propounded by Venkataramana Rao, J. is right. If the estate created under the document is only a life estate in each holder, then no alienation made by him can enure beyond his lifetime. Likewise if the clause against alienation enables the successor of the alienor to avoid the alienation, then again the appellants fail. It is urged by Mr. Narasimhachariar for the appellants that the view taken by Venkataramana Rao, J. is wrong and that we ought not to follow it. Without going so far as to say that the decision is binding on the present appellants by way of *res judicata*, Mr. Raghava Rao urges that the view taken by Venkataramana Rao, J. is right and that we ought to follow the decision of two learned Judges of this Court on the identical question as to the effect of the document Ex. P-1. We have heard the learned Advocates at great length. While we are not prepared to agree that the document creates a series of life estates, we are in agreement with the view expressed by Venkataramana Rao, and Abdur Rahman, JJ., that the effect of an alienation is not merely to enable the grantor to resume on failure of legal heirs but also to enable the successors of the alienor to avoid the alienation after his death.

Apart from the validity or otherwise of a provision against alienation, the existence of such a provision does not in our opinion, control what would otherwise be an absolute estate of fee simple so as to create a series of life estates in each holder. In this case the grant to Sreeram Singam Naick who was till then holding the village in question on the service tenure says that this was abolished and the preamble contained in the first paragraph says that the Governor in Council resolved to compensate the loss sustained by the grantee by confirming the villages held formerly on mokhasa tenure *to them and their heirs on shrotrium tenure.* Clause 2 says that in consequence of the foregoing resolution, the Governor in Council confers upon the *grantee* the village in question on shrotrium tenure. Clause 3 says that the *grantee* is entitled to collect the Russoms and Merahs and to appropriate the amount to *his own* use and clause 4 provides that the Governor in Council confirms "*to you and your heirs*", *i.e.*, *the grantee Sreeram Singam Naick and his heirs* the village in question as shrotrium so long as he "discharged the rent and are obedient to the laws and regulations established or to be established under the authority of the Governor-in-Council." If the documents had ended with clause 4 there does not seem to be any room for argument that the estate created was anything other than an absolute

1. (1938) 1 M.L.J. 686 : I.L.R. 1938 Mad. 767.

estate of fee simple. That being so, the clause against alienation contained in clause 5 would not, in our opinion, lead to the conclusion that taking the document as a whole, the estate created is one of a series of life estates. Reverter to the donor or his heirs on failure of the heirs of the grantee—a provision which is generally found in maintenance grants made by holders of impartible estates to the junior members of their family—does not prevent an alienation and the alienee would be entitled to enjoy the property, at any rate, as long as the line of the grantee continues. It is one thing to say that there is a restraint against alienation so as to let in not merely the grantor on failure of heirs but also the alienor's successor on the death of the alienee, but is quite another thing to say that the holder for the time being has only a life estate.

Mr. Raghava Rao urges that the circumstances of this case and the very nature of the estate conferred by the document show that it is only a life estate in the holder for the time being.

The argument is that prior to the grant Ex. D-1, the village in question belonged to the entire family of Sriram Singam Naick and that the declared object of the grant as shown by the wording of the document is to provide for the family as a whole and that the object of the grant would be frustrated by postulating a free hold estate of inheritance in Sriram Singam Naick and which he could alienate at his pleasure. He relied on the decisions of the Judicial Committee in *Gulabdas Jugjivandas* v. *The Collector of Surat*[1] and *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*,[2] both of which are referred to by Venkataramana Rao, J. In the earlier case of *Gulabdas Jugjivandas* v. *The Collector of Surat*[1], a grant of a certain villages was made by the East India Company to one Najamooddin who was the Commander-in-chief of the forces of the Nawab and the declared object of the grant as stated in the document was to make a provision for Najamooddin and his descendants. The Judicial Committee pointed out that it was the intention of the East India Company as stated in the document to make a permanent provision for the family of the said *Bukshee*, *i.e.*, the grantee. Having regard to the peculiar character of the grant from the Government under the circumstances related and having regard to the object which the grant expressed, the Judicial Committee came to the conclusion that the Court of Bombay was right in treating the grant as one conferring upon the descendants of Najamooddin, an estate for life and life only. The grantee was the Commander-in-chief of the Nawab and as his service as Commander-in-chief were no longer necessary as the East India Company took over the administration of Surat, a provision was made to recompense him and his descendants. The other case relied upon is *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*[2] There again the grantee was the eldest son of the Nawab Nazim of Bengal, Bihar and Orissa. A contract was entered into between the Government and the grantee evidenced by a document dated 12th March, 1891. The grantee agreed to relinquish the title then held by him and to accept in return the titles of Nawab Bahadur of Murshidabad and Amir-ul-Omrah. A provision was also to be made for the maintenance of the said dignity. The Secretary of State on behalf of the Government covenanted to pay for the due maintenance and support of the said titles to the grantee and his lineal heirs male in perpetuity a particular sum and agreed that the immoveable properties mentioned in the schedule to the document should be held and enjoyed by the grantee and such one among his male lineal heirs as may be successfully entitled to hold the titles in perpetuity with and subject to the incidents, powers, limitations and conditions as to inalienability and otherwise. There was also a provision that the

"Nawab Bahadur shall not, nor any of his successors in the said titles, sell, mortgage, devise or alienate the said properties respectively."

1. (1878) L.R. 6 I.A. 54 : I.L.R. 3 Bom. 186 (P.C.).

2. (1931) 61 M.L.J. 208 : L.R. 58 I.A. 215 : I.L.R. 59 Cal. 1 (P.C.).

In that case the Judicial Committee held that the interest created was one of a series of life estates. It will be observed that the title was to descend to one in the lineal male line and the grant was to support the dignity of the holder of the title for the time being. Unless we have circumstances similar to those present in the above case, it is difficult to say that a mere restraint on alienation leads to the inference that the estate created by the document is one of a series of life estates.

The next question is whether the restraint against alienation enables the successor of the alienor to repudiate the alienation after the death of the alienor. On this point the learned Judges who decided the earlier appeal in *Sundararajulu Naidu* v. *Papiah Naidu*[1] have taken the view that the object of the clause was not merely to enable the grantor to resume on failure of legal heirs but also for the benefit of the successors. As we said before, there is much to be said for the argument advanced by Mr. Narasimhachariar that the use of the word "but" between the two parts of clause 5 is some indication that the restraint was intended only to enable the grantor to resume on failure of the grantee's legal heirs. But giving the matter our best consideration and having regard to the views expressed by all the three learned Judges of this Court on the identical document, we are not prepared to say that the construction placed upon it by the lower Court is wrong. Both the views are possible and we are not prepared to differ from the view expressed by the learned Judges in the previous appeal.

Appeals Nos. 170 and 171 are dismissed; we make no order as to costs either here or in the lower Court.

* * * * * *

K.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

K. Vaidyanatha Mudaliar .. *Appellant**

v.

M. Vedachala Mudaliar .. *Respondent.*

Madras Estates Land Act (I of 1908), sections 3 (11) (a) and 111—Rent—Dues for the enjoyment of backyards of the houses of ryots—Proceedings under section 111 for their recovery—Maintainability.

A landholder sought to recover by proceedings under section 111 of the Madras Estates Land Act certain amounts due for water taken to the backyards of the houses of certain ryots. The backyards were not ryoti lands and there was no exchange of pattas and muchilikas in respect of them. On a question as to the right of the landholder to bring the holding to sale for recovery of the sums in question,

Held, that the mere fact that a person who happens to be a ryot is under an obligation to pay some amounts to a landholder in respect of certain non-ryoti lands in the estate does not make those amounts payable "rent" under the Act. In the circumstances the proceedings taken by the landholder was misconceived.

Appeals against the decrees of the District Court, Chingleput, in A. S. Nos. 231 and 232 of 1942 and 130 and 137 of 1943, preferred against the decrees of the Court of the Subordinate Judge, Chingleput, in S. S. Nos. 282 and 283 of 1941 and 353 and 352 of 1942.

V. Govindarajachari for Appellant.

V. Ramaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—Second Appeals Nos. 328 to 330 of 1944 arise out of suits filed by the plaintiffs who happen to be certain ryots in the village of Annamalai Putheri,

1. (1938) 1 M.L.J. 686: I.L.R. (1938) Mad. 767.

*S. As. Nos. 327 to 330 of 1944. 27th July, 1945.

of which the respondent is the landholder. The amounts for the recovery of which proceedings were taken under section 111 of the Madras Estates Land Act are alleged to be due for water taken to the backyards of the plaintiffs' houses. The plaintiffs contest the right of the landholder to bring the holding to sale for recovery of these sums which accrued due in respect of the backyards. I called for findings as it was not clear whether the backyards are ryoti lands. I also called for a finding on the question whether there was an exchange of patta and muchilika in respect of these backyards. The findings are that the backyards are not ryoti lands and that there has been no exchange of pattas and muchilikas with reference to the backyards. True the plaintiffs have executed muchilikas and accepted pattas with reference to ryoti lands of which they are the ryots. But with respect to the backyards it is clear that there is no patta and no muchilika and that they are not ryoti lands. A very ingenious argument has been attempted on behalf of the respondent. His learned advocate urges that under section 77 a landholder is given a right of recovering an arrear of rent either by a suit or by distraint and sale of moveable property or by sale of a ryot's holding and that therefore if the amount in question is an arrear of rent in respect of the backyard the landholder may proceed to recover it by sale of the ryot's holding, that is, ryoti land included in the patta. This does not appear to me to be correct. The expression "rent" is defined in section 3 (11) to mean whatever is lawfully payable in money or in kind or in both to a landholder by a ryot and the term "ryot" is defined in section 3 (15) to mean a person who holds for the purpose of agriculture ryoti land on condition of paying to the landholder the rent which is legally due upon it. It is admitted that backyards are not ryoti lands. If backyards are not ryoti lands, then what is payable in respect of them is not an amount which has to be paid by a ryot and does not satisfy the definition of "rent" in section 3 (11). Attention is drawn to the provisions of section 3 (11) (*a*) by which an amount which is payable by way of a local tax, cess, etc., payable to a landholder by a ryot is made rent. The terms of this clause appear to me to be against the respondent's contention. An amount payable by a ryot by way of a local cess or other sum lawfully payable is not in every case made "rent". It is made "rent" only where it is payable by a ryot as such, according to the law or usage having the force of law. Then and then alone the local cess or tax or fee is included in the definition of "rent." Section 3 (11) (*a*) is an enlargement by a specific enactment of what otherwise would not be included in section 3 (11). If section 3 (11) had stood alone, the amounts that are set out in section 3 (11) (*a*) would not be rent but that they are made "rent" by an express enactment. This shows that the mere fact that a person who happens to be a ryot is under an obligation to pay some amounts to the landholder in respect of certain non-ryoti lands in the estate does not make those amounts payable "rent" under the Act.

The result is that the proceedings taken by the landholder must be held to be misconceived and the appeals allowed and the suits decreed.

Coming to S. A. No. 327, it is agreed that the suit must be decreed in respect of Rs. 15-6-2. That is, the landholder is not entitled to recover Rs. 15-6-2 which is the amount levied on the property included in this suit. But he is entitled to recover the balance, namely, Rs. 0-8-3 which is now admitted to be a sum levied in respect of what is clearly ryoti land in the holding of this particular ryot. Subject to this modification the suit is decreed.

It is said that the admitted amounts have been paid. No further proceedings will be taken by the landholder.

The appellants are entitled to their costs throughout in all the Courts. No leave.

K.C. *Appeals allowed.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of Ceylon.)

PRESENT :—LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Goonesinha .. *Appellant**

v.

The Honourable O. L. de Kretser .. *Respondent.*

Certiorari, *writ of—Court competent to issue, cannot issue it to bring up an order made by a Judge of that Court—Cannot run from one superior Court to another superior Court—Ceylon (States Council Elections) Order in Council* (1931)*—Election petition under, to Supreme Court—Order by Judge of that Court—Supreme Court cannot issue the writ to bring up such an order to be quashed.*

A Court having jurisdiction to issue a writ of *certiorari* will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court.

While the ordinance constituting the Supreme Court of Ceylon does not confer upon it original, but only appellate jurisdiction in civil cases, the cognizance of election petitions under the Ceylon (States Council Elections) Order in Council, is a special jurisdiction conferred upon the Supreme Court by the latter Order in Council. An election petition is a proceeding in the Supreme Court. Cognizance of these petitions is an extension of or addition to, the ordinary jurisdiction of the Supreme Court and consequently *certiorari* cannot be granted to bring up any order made in the exercise of that jurisdiction. Even if the election judge is to be regarded as a special or independent tribunal his Court would be a Superior Court.

D. N. Pritt, K.C., P. V. Subba Row and *R. Parikh* for Appellant.

F. Graham for Respondent.

Their Lordships' Judgment was delivered by

LORD GODDARD.—On 26th April, 1941, a by-election was held for the return of a member of the Ceylon State Council for the electorate of Colombo North. The successful candidate was a Mr. de Silva, and the present appellant, who takes an active part in political and municipal affairs in Colombo, was one of his prominent supporters. Subsequently, a petition was presented to the Supreme Court of Ceylon, under the Ceylon (States Council Elections) Order in Council, 1931, asking that the election might be declared void and alleging general intimidation, treating and undue influence. In two instances undue influence on electors to cause them to vote for Mr. de Silva was alleged to have been exercised by the appellant, and in his judgment which was delivered on 22nd December, 1941, the Election Judge, who is the present respondent, found both these charges proved. The learned Judge thereupon ordered that notice should at once be given to the appellant in terms of Article 79 (2) of the Order in Council to show cause why he should not be reported to His Excellency the Governor as having been guilty of a corrupt practice. The offence of undue influence, as defined by Article 53 of the Order in Council is by Article 55 declared to be a corrupt practice. The combined effect of Article 55 (1) and Article 79 (3) is that a person reported for a corrupt practice is rendered incapable of voting or being elected to the State Council for a period of seven years. The notice given to the appellant to show cause referred to only one of the cases found proved against him. On appearing to show cause the appellant, who had given evidence on the trial of the petition, desired to call nine witnesses, whose names he had previously given, with the object of proving that he was not guilty of the offence specified in the notice which the Election Judge had found proved. The learned Judge refused to hear these witnesses, on the ground that he could not be asked to reverse the findings which he had already made on the trial of the petition. He held that, as by Article 78 of the Order in Council his determination as to the validity of the election was final, it followed that his finding that a person had committed a corrupt or illegal practice must necessarily be final also, and he reported the appellant. The appellant then moved the Supreme Court for a mandate in the nature of a writ of *certiorari* to bring up what was called the Order by which he was reported, though it would perhaps be more accurate to call it simply the report, and have it quashed. On June 1st, 1942,

* P. C. Appeal No. 51 of 1943. 20th December, 1944.

the Chief Justice of Ceylon delivered judgment refusing to issue the mandate, holding that the Election Court in Ceylon was a Superior Court to which no writ in the nature of *certiorari* would lie. Against his refusal the Supreme Court gave the appellant leave to appeal to His Majesty in Council.

Their Lordships are of opinion that the judgment of the learned Chief Justice is plainly right. By Article 75 of the Order in Council every election petition is to be tried by the Chief Justice or a Judge of the Supreme Court nominated by him, and the Chief Justice or the nominated Judge are referred to in the order as the Election Judge. By clause 5 of this Article it is provided that unless otherwise ordered by the Chief Judge all interlocutory matters in connection with a petition may be dealt with and decided by any Judge of the Supreme Court. Article 76 provides that an election petition may be presented to the Supreme Court by one or more of certain classes of persons. These two sections alone would appear to show quite clearly that an election petition is a proceeding in the Supreme Court, and a reference to the rules of procedure which are enacted in the Sixth Schedule to the Order confirms, if confirmation were necessary, this view. Rule 4 gives the form a petition is to take and its heading is "In the Supreme Court of Ceylon." Rule 29 deals with the withdrawal of a petition which cannot be done without the leave of the Judge, that is the Election Judge. Sub-rule 2 of this rule prescribes the affidavits which are to be filed on such an application, but provides that a Judge of the Supreme Court, and not only the Election Judge, may on special grounds dispense with the affidavit of any particular person. Again rule 37 provides that the petition is not to abate because a respondent dies, resigns, or gives notice to the Court that he does not intend to oppose the petition, and provision is made as to how and when notice is to be given to the Court. While the Ordinance constituting the Supreme Court does not confer upon it original, but only appellate jurisdiction in civil cases, their Lordships are of opinion that cognizance of election petitions is a special jurisdiction conferred upon the Supreme Court by the Order in Council, and that is abundantly clear from the provisions to which they have referred. It is well settled and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a writ of *certiorari* will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a Superior Court issue the writ directed to another Superior Court—*Reg* v. *Justices of Central Criminal Court*[1]—and if the Election Judge is to be regarded as a special or independent tribunal his Court would, in their Lordships' opinion, be a Superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognizance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently *certiorari* cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Solicitors for appellant: *Hy. S. L. Polak & Co.*

Solicitors for respondent: *Burchells.*

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BYERS.

Sri Vyricherla Chandramani Pattamahadevi Zamindarini of Chemudu estate .. *Appellant**

v.

The Municipal Council, Vizagapatam, represented by its Commissioner, Vizagapatam .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 81, clauses (3) and (4)—Construction—Land covered by casuarina plantation—If "agricultural land" for purposes of assessment to property tax.

1. (1883) 11 Q.B.D. 479.

*S. A. No. 2403 of 1944. 10th August, 1945.

The use of the word "agriculture" in section 81 (3) of the Madras District Municipalities Act is not to denote agriculture in the narrowest sense of the word but to distinguish land which is cultivated or used for agricultural purpose from land which is not so used or covered by any crop. Agriculture includes for the purposes of the Act, the cultivation of a casuarina tope and land covered by a casuarina plantation is agricultural land for purposes of assessment to property tax under section 81, clauses (3) and (4) of the Madras District Municipalities Act.

Appeal against the decree of the Court of the Subordinate Judge, Vizagapatam, in A. S. No. 89 of 1944, preferred against the decree of the Court of the District Munsiff, Vizagapatam, in O. S. No. 6 of 1942.

K. Umamaheswaram for Appellant.

P. S. Raghavarama Sastri for Respondent.

The Court delivered the following

JUDGMENT.—The question which arises in this second appeal is whether land covered by a casuarina plantation is agricultural land for purposes of assessment to property tax under section 81, clauses (3) and (4) of the Madras District Municipalities Act.

The facts so far as they are necessary are that the appellant is the owner of a field measuring 11 acres within the Vizagapatam municipal limits. During the relevant period six acres were used as pasture and were assessed accordingly under section 81 (4) (*a*) of the Act; the remaining five acres were covered by casuarina trees and, rejecting the appellant's claim to their assessment as agricultural land, were assessed under section 81 (3). An appeal was carried without success to the municipal council, and eventually a suit was filed in the District Munsiff's Court. The plaintiff was unsuccessful in the suit and also in the lower appellate Court. As already stated, the only point taken is that for purposes of section 81 of the District Municipalities Act the word 'agriculture' must be construed in its widest sense so as to include not only the cultivation of food crops but also the cultivation of garden crops, trees, bushes and flowers.

The two decisions of this Court which first require notice are *Pavadai Pathan* v. *Ramaswami Chetty*[1] and *Chandrasekhara Bharathi Swamigal* v. *Duraiswami Naidu*[2]. In the first of these cases it was held that a lease of land for growing casuarina trees was a lease for an agricultural purpose within the meaning of section 117 of the Transfer of Property Act. The Transfer of Property Act contains no definition of the word "agriculture," and the learned Judges held that it connoted not only tilling the soil for raising food products but included the cultivation of the soil for any useful purpose. The second of these decisions related to the word "agriculture" as used in the Madras Estates Land Act, and it was held in that case that growing casuarina trees, that is trees for fuel, is not an agricultural purpose so as to make a person who holds the land for that purpose a ryot within the meaning of the Madras Estates Land Act. In the Madras Estates Land Act, the word "agriculture" is thus defined :

"'Agriculture' with its grammatical variations and cognate expressions shall include horticulture"

and Ananthakrishna Aiyar, J., applying the legal maxim *expressio unius est exclusio alterius*, thought that this was of peculiar significance. Both the learned Judges examined various provisions of the Act in discussing the precise meaning of the word "agriculture" in relation to the Madras Estates Land Act before holding that it did not include the cultivation of a casuarina tope.

In *Sarojini Devi* v. *Sri Krishna Anjaneya Subramaniam*[3], the meaning of the words "agricultural land" was discussed at some length in relation to the provisions of the Hindu Women's Rights to Property Act, 1937. Patanjali Sastri, J., before examining the various decisions made this observation :

"It is somewhat remarkable that a word in such common use as 'agriculture' should have given rise to a great divergence of judicial opinion in regard to its interpretation."

1. (1922) 43 M.L.J. 191 : I.L.R. 45 Mad. 710.
2. (1931) 61 M.L.J. 648 : I.L.R. 54 Mad. 900.
3. (1944) 1 M.L.J. 361.

Reference was made to the decision of the Privy Council in *Kesho Prasad Singh* v. *Sheo Pargash Ojha*[1], in which it was held that land granted by a zamindar "for the purpose of planting a grove the grantee agreeing to deliver one half of the fruit to the zamindar" was not "land held for agricultural purposes" within the meaning of the Agra Tenancy Act. The learned Judge pointed out that the earlier decisions in that province were based on the peculiar status of grove-holders who had no rights in the land after the trees were cut, and he went on to observe that in the judgment of the Privy Council there was no discussion of the meaning of the term "agriculture" and no test of any general application was laid down. The District Municipalities Act contains no definition of the word 'agriculture' and it is therefore necessary to interpret it in the light of various relevant provisions of the Act and with particular reference to the purpose for which the word has been used.

Section 81 (1) commences with these words :

"If the council by a resolution determines that a property tax shall be levied, such tax shall be levied on all buildings and lands within municipal limits save those exempted by or under this Act or any other law."

Clause (2) is in these words :

"Save as otherwise provided in this Act, those taxes shall be levied at such percentages of the annual value of lands or buildings or both as may be fixed by the municipal council, subject to the provisions of section 78."

Clause (3) runs thus :

"The municipal council may, in the case of lands which are not used exclusively for agricultural purposes and are not occupied by, or adjacent and appurtenant to, buildings, levy those taxes at such percentages of the capital value of such lands or at such rates with reference to the extent of such lands as it may fix."

Clause 4 (*a*), under which the plaintiff (appellant) claims to be assessed, is in these words :

"The municipal council may, in the case of lands used exclusively for agricultural purposes, levy those taxes at such proportion as it may fix of the annual value of such lands as calculated in accordance with the provisions of section 79 of the Madras Local Boards Act, 1920."

Section 82 (1) reads thus :

"Every building shall be assessed together with its site and other adjacent premises occupied as an appurtenance thereto unless the owner of the building is a different person from the owner of such site or premises."

If these sections and their clauses are considered together, it seems clear that one of their main purposes is to distinguish between the various classes of land assessable to property-tax. There are sites occupied by buildings and their adjacent premises, assessable together with buildings standing upon them under section 82 (1) of the Act; under section 81 (4) there is land used exclusively for agricultural purposes, apparently irrespective of its situation in relation to buildings ; and section 81 (3) contemplates the assessment of land which is not used exclusively for agricultural purposes and is not occupied by buildings or appurtenant to buildings, that is to say, house-sites, backyards, compounds, etc. Thus it appears that the use of the word "agriculture" in section 81 (3) of the Act is not to denote "agriculture" in the narrowest sense of the word, but to distinguish land which is cultivated or used for an agricultural purpose from land which is not so used or covered with any crop. In discussing the meaning of the word "agriculture" in relation to the Hindu Women's Rights to Property Act, Patanjali Sastri, J., after referring to the Legislative Lists in the Government of India Act, 1935, uses these words :

"In such context it seems to us that the expression 'agricultural land' must receive the widest meaning, for it would be somewhat grotesque to suppose that Parliament intended that lands devoted to the production of one kind of crop should devolve according to laws passed by Provincial Legislatures, while those used for growing another kind should pass according to laws made by the Central Legislature, or that 'the circumstances in which the cultivation is carried on' (per Reilly, J., in *Chandrasekhara Bharathi Swamigal* v. *Duraiswami Naidu*[2]), should determine the law which governs the devolution of the land. Nor could it have been intended that succession to such lands should depend on the degree of tillage or preparation of the soil or of the skill and labour expended in rearing and maintaining the plants. We are of opinion that for the purposes of the relevant entries in Lists II and III

1. (1924) 47 M.L.J. 824 : L.R. 51 I.A. 381 : I.L.R. 46 All. 831 (P.C.).
2. (1931) 61 M.L.J. 648 : I.L.R. 54 Mad. 900.

of Schedule VII, the expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry. It follows that the mango grove in question is agricultural land in respect of which the Hindu Women's Rights to Property Act, 1937, does not operate to regulate succession."

In the same way it would be absurd to hold that for purposes of taxation under the District Municipalities Act land occupied by a betel grove or a mango tope is agricultural land and that land covered by a casuarina tope is not agricultural land. Having regard to the purpose with which the word "agriculture" has been used in the relevant sections of the Act, my view is that it includes the cultivation of a casuarina tope.

In the result the appeal is allowed, the decisions of both the lower Courts are set aside, and the plaintiff's suit is decreed with costs throughout.

Leave to appeal is refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Jaina Muhammad Sheriff Maracair *alias* Jackiria Muhammad Sheriff Maracair (deceased) and others .. *Appellants**

v.

The Official Assignee of Madras and others .. *Respondents.*

Administrator—Appointment by foreign Court—Right to maintain suit in British India—Acquisition of foreign domicile—Inference from circumstances—Undischarged bankrupt—Right to maintain suit as administrator—Suit to avoid alienations of insolvent—Leave of Insolvency Court—Presidency Towns Insolvency Act (III of (1909), *section 17—Civil Procedure Code (V of* 1908), *Order* 1, *rule* 8*—Applicability.*

The deceased went to Singapore in 1884, married a wife and started a business at that place. He returned to India finally in 1909 but there was no evidence that from 1884, he lived continuously in Singapore. It appeared that by another wife of his in India he had a number of children and apparently he was visiting India a number of times. After 1909 he never went back to Singapore and he looked after his business there from India.

Held, that it could not be said under the circumstances that the deceased acquired a Singapore domicile.

An administrator appointed by a foreign Court is not entitled to sue in the British Indian Courts for recovery of immoveable property.

An administrator who is an undischarged bankrupt can nevertheless maintain a suit as administrator of his father since such a right does not vest in the assignee in his bankruptcy.

A suit by a creditor to set aside alienations made by the insolvent or to assert a claim on behalf of the estate of the insolvent against a third party can be maintained without the leave of the Insolvency Court.

Chidambaram Chettiar v. *Sellakumara Goundan*, (1941) 2 M.L.J. 684 : I.L.R. (1942) Mad. 1 (F.B.), relied on.

Order 1, rule 8, Civil Procedure Code, only applies where some persons out of a large body of persons entitled to file a suit desire to conduct proceedings on behalf of themselves and on behalf of the absentee parties. But when all the persons jointly interested are made parties, Order 1, rule 8 does not apply and there is no need to apply for leave of the Court.

Appeals against the decree of the District Court, East Tanjore, in O. S. No. 1 of 1941.

V. Ramaswami Aiyar and *S. Ramachandra Aiyar* for Appellants and *N. T. Raghunathan* and *R. Vaidyanathan* for Respondents in Appeal No. 257 of 1943.

K. V. Ramachandra Aiyar for the Appellants, The Official Assignee of Madras (*V. Thiagarajan*) in person in Appeal Nos. 304 and 417 of 1943 and *R. Viswanathan* and *N. D. Varadachari* for Respondents in Appeal No. 304 of 1943.

The Judgment of the Court was delivered by

Somayya, J.—These three appeals arise out of O. S. No. 1 of 1941 on the file of the District Court of East Tanjore. The suit was filed by the appellant in A. S. No. 257 of 1943 for various reliefs regarding the properties in suit. The first defendant is the Official Assignee of Madras who is acting as an auxiliary of the Official Assignee of Singapore in the insolvency of the second defendant K. Muhammad

* Appeals Nos. 257, 304 and 417 of 1943. 23rd July, 1945.

Hussain. Muhammad Hussain was adjudged a bankrupt by the Singapore Court by an order passed in January, 1931. At the instance of the Official Assignee of Singapore in whom the estate of the second defendant vested, the Official Assignee of Madras has been acting in aid of and as the auxiliary of the Singapore Official Assignee. This is by an order of the High Court of Madras passed in its insolvency jurisdiction.

One Zacharia Hussain of Velanganni in the Tanjore district started a business in Singapore in boats, lighters, etc., in 1884, and built up a lucrative business. He took his wife's brother the second defendant, Muhammad Hussain to assist him in the business. Zacharia left Muhammad Hussain in charge of the business and returned to India in 1909, having appointed him as his agent. It would appear that from 1909 to 1911 another person was associated as joint agent with the second defendant and afterwards the second defendant was acting as the sole agent of Zacharia Hussain. Zacharia lived ever afterwards in British India and did not go to Singapore. He died in British India on the 20th December, 1917. Thereafter the second defendant was left in sole charge without any effective control. The plaintiff Sheriff Maracair is the eldest son of Zacharia. The third defendant is his Singapore wife. Fourth and fifth defendants are the sons of Zacharia and brothers of the plaintiff and the sixth defendant is Zacharia's daughter by his Indian wife. The seventh defendant is the wife of the second defendant and she is impleaded as being in possession of certain properties claimed in suit. We are not in this appeal concerned with the eighth defendant. The ninth defendant is the Muslim Association of Nagore. It is in possession of the fourth item in Schedule B. The tenth defendant is the purchaser of the properties in C schedule. He died during the pendency of the suit and defendants 12 to 15 have been added as legal representatives. We are not concerned with the eleventh defendant in this appeal.

Plaintiff and the third defendant were appointed joint administrators of the estate of Zacharia Hussain by the Supreme Court of Singapore under Letters of Administration evidenced by Ex. P-1-a dated 6th August, 1926. The two executors filed C.S. No. 96 of 1926 in the Singapore Court for a declaration that the second defendant Muhammad Hussain was a trustee for the estate of Zacharia and was bound to render accounts as such. The suit was decreed by the Singapore Court and Ex. P-2 is the judgment. The decretal portion of the judgment directed the second defendant to render an account of his management on the footing that he was an agent and trustee bound to account. An appeal was filed against that judgment and during the pendency of the appeal the parties came to a settlement evidenced by Ex. P-3 dated the 20th June, 1929, by which an account of the business in boats and lighters carried on in the name of the second defendant from the 1st January, 1925, should be taken and settled by the person named in it and that the net assets should be divided in equal shares between the estate of the deceased Zacharia and Muhammad Hussain the defendant. Certain properties mentioned in paragraph 7 of P-3 were also to be divided between the two parties and clause 9 which is important says this:

"Neither party to have any claim against the other for any properties either in Singapore or in India save as herein mentioned."

Nothing seems to have been done in pursuance of this and the parties entered into a partnership agreement evidenced by Ex. P-4 on the 23rd November, 1928. Instead of having an account taken of the business as directed by Ex. P-3 the parties agreed that the business should be run in partnership with the administrators of the estate of Zacharia on the one side and Muhammad Hussain the second defendant on the other. It would appear that the second defendant had transferred his business in lighters and boats to his Singapore wife and the assets of that business and the other properties in Singapore were brought into the partnership as partnership assets. There are other conditions which will be referred to when necessary.

Even before Ex. P-3 the plaintiff herein was adjudicated an insolvent at the instance of the second defendant on the 4th February, 1927. The debt on the

basis of which this adjudication was made was under Exs. P-3 and P-4 to be given up by the second defendant. Subsequent to this partnership agreement this business was carried on for some years by the second defendant who was left in sole charge and thereafter the plaintiff was also in management for sometime. In December, 1930, the second defendant applied to be adjudged bankrupt and on that petition of his the adjudication order was made in January 1931. The present suit was filed for various reliefs regarding some properties which the plaintiff alleges are held in trust for Zacharia's estate which he represents. We are in this appeal concerned with three sets of properties—one claimed by the seventh defendant, the other by the ninth defendant and the third by the tenth defendant. The seventh defendant claims the property described in item 3 of schedule B and the E schedule mortgage right. The ninth defendant claims item 4 of schedule B and the tenth defendant claims C schedule properties. Item 3 of schedule B was purchased in the name of the seventh defendant under Ex. D-14 on the 7th January, 1927, for Rs. 9,000. She took also an assignment of a mortgage which is mentioned as the E schedule property. No date is given to this assignment but as the lower Court says it was admitted that it was early in 1926. The mortgage was one executed by the seventh defendant's father in favour of a third party. We have no further information either as regards the document itself or the assignment. Neither the originals nor authenticated copies of the documents have been filed in this case. The plaintiff alleges that the consideration of Rs. 9,000 for Ex. D-14 and the amount of Rs. 5,000 the consideration for the assignment of the mortgage came out of moneys sent by the second defendant from Singapore. As regards the moneys sent from Singapore the allegation is that they all form part of Zacharia's estate, the second defendant having had no property of his own. The plaintiff therefore claims that these two properties that were acquired in the name of the seventh defendant were really acquisitions made by the second defendant with the aid of moneys belonging to Zacharia's estate and that therefore Zacharia's estate is entitled to a declaration that it is the beneficial owner of these two properties. In the alternative it is said that Zacharia's estate is a creditor entitled to a large sum of over Rs. 50,000 from the second defendant's estate which is being administered by the Official Assignee of Singapore whose auxiliary is the present first defendant the Official Assignee of Madras. In its capacity as the creditor of the second defendant's estate it is said that Zacharia's estate is entitled to a declaration that acquisitions in the name of the seventh defendant were made really for the benefit of the second defendant the insolvent and that they are therefore available for distribution among the creditors of the second defendant. As regards the ninth defendant the alienation in its favour is Ex. D-13 dated the 24th November, 1930. It is really a gift of the property subject to an earlier mortgage held by the ninth defendant from the original owner. The second defendant purchased the properties subject to the mortgage in favour of the ninth defendant under Ex. D-12, dated the 14th August, 1926. The second defendant assigned whatever interest he had in this property to the ninth defendant by Ex. D-13 on the 24th November, 1930. For this latter document there was no consideration. The tenth defendant is a vendee of the properties in schedule C for Rs. 57,0000 under Ex. D-6, dated the 17th May, 1930. The case of the plaintiff as regards the properties claimed by the ninth and tenth defendants is the same as the case against the second defendant. The acquisitions themselves it is said were made with the moneys that really belonged to Zacharia's estate and that therefore the estate is entitled to a declaration that it is the beneficial owner. In the alternative, if they are to be regarded as the second defendant's estate the claim is that as creditor in the insolvency of the second defendant the plaintiff is entitled to have it declared that the gift in favour of the ninth defendant and the sale in favour of the tenth defendant are both bad against the creditors of the second defendant.

Various defences were raised by the different sets of defendants. The seventh defendant's defence is that she herself found the money required for the purchase of item 3 of schedule B and that she has been in adverse possession of the property

ever since the date of her purchase in 1927. As regards the assignment of the mortgage, she says that she found the money for it. The ninth defendant's case is that the suit is barred by limitation. The tenth defendant says that he is a *bona fide* purchaser for value without notice of any claim on the part of Zacharia's estate or of the embarrassing position of the second defendant and that in either case he is protected against the claim of the plaintiff.

The learned District Judge held that the acquisitions in the name of the seventh defendant of the third item in schedule B and of the mortgage right mentioned in schedule E were really made with the moneys sent by the second defendant from Singapore and that those moneys came out of Zacharia's estate. The lower Court held that there was no question of adverse possession by the wife against the husband and that the suit was not barred by limitation. He therefore gave a decree against the properties in the hands of the seventh defendant. As regards the ninth defendant the learned Judge held that the alienation under Ex. D-43 is binding on the plaintiff and that the ninth defendant must however pay Rs. 1,500 to the plaintiff. The tenth defendant was found to be a *bona fide* purchaser for value without notice of the claim of Zacharia's estate and the suit against the tenth defendant was in consequence dismissed. The suit was also held to be barred by limitation against the tenth defendant. Appeal No. 257 is filed by the plaintiff against the legal representatives of the tenth defendant. There is no appeal by the plaintiff regarding the dismissal of the suit for possession against the ninth defendant but there is an appeal by the ninth defendant regarding the direction made by the lower Court that it should pay Rs. 1,500 to the plaintiff. This is Appeal No. 304 of 1943. The last Appeal No. 417 is by the seventh defendant and she attacks the decree of the lower Court directing that the plaintiff is entitled to get the items in her possession.

A number of questions relating to the maintainability of the suit at the instance of the plaintiff have been raised and we shall deal with them after deciding the questions of fact.

(Their Lordships dealt with the facts of the case and continued).

Thus on the merits of the case we have no reason to disturb the findings of the learned Judge as regards the properties claimed by the various defendants.

It now remains for us to deal with the various objections raised to the maintainability of the suit. The first point urged is that the plaintiff has filed this suit mainly as a joint administrator of the estate of Zacharia, that he was appointed as such administrator by the Supreme Court of Singapore and that an administrator appointed by a foreign Court is not entitled to sue in British Indian Courts for recovery of immoveable property. As regards the law on this subject, there is no difficulty. In 13 Halsbury's Laws of England we have the following passage in paragraph 473:

> "The most important distinction between judgments *in rem* and judgments *inter partes* is that whereas the latter are only binding as between the parties thereto and those who are privy to them, the judgment *in rem* of a Court of competent jurisdiction is, as regards persons domiciled and property situated within the jurisdiction of the Court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of the persons or property, or as to the right or title to the latter, and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. In other words, all persons, whether party to the proceedings or not, are estopped from averring that the status of persons or things, the right or title to property, is other than the Court has by such a judgment declared or made it to be. But a judgment *in rem* can have no effect as such beyond the limits of the state within which the Court delivering the judgment exercises jurisdiction, unless the thing affected is situate, or the persons affected is domiciled, within those limits."

Again, we have the following passage in Cheshire on Private International Law (2nd edition), page 508:

> "The rule is absolute that the status of an administrator appointed by a foreign Court is not recognised in England. His title relates only to property that lies within the jurisdiction of the country whence he derives his authority, and therefore he has no right to take or to recover property in England without a grant from the English Court."

It is alleged by Mr. Ramaswami Iyer, learned counsel for the plaintiff-appellant, that the deceased Zacharia acquired the Singapore domicile and that that would

enable his client to file the suit. He points out that Zacharia went to Singapore in 1884, married a Singapore wife, started a business and settled down there. The inference that the learned advocate asks us to draw is that the deceased had the intention of permanently settling down at Singapore and that he abandoned the domicile of origin, *viz.*, the Indian domicile. If really Zacharia had settled down at Singapore and had abandoned his domicile of origin and had intended to stay permanently at Singapore the result contended for may follow. But there is no evidence regarding the circumstances under which Zacharia went and started business at Singapore. There is no allegation in the plaint that Zacharia settled down at Singapore permanently without any idea of returning to India and that he therefore acquired the foreign docimile. Further there is no evidence from which we can say that he abandoned the Indian domicile. True it is that he returned to India finally in 1909 but there is no evidence that from 1884 Zacharia lived continuously in Singapore. It is in evidence that by his Indian wife he had a number of children. It is not even suggested that the Indian wife was taken to Singapore. It is therefore clear that the deceased Zacharia must have been visiting India a number of times. He returned finally to India in 1909 and though he was alive for eight years thereafter, he never went to Singapore. He took the second defendant as his agent and associated him in his business. The business was looked after by the second defendant jointly with another for a couple of years and thereafter by the second defendant himself, supervision being exercised by the late Zacharia from India. We are not in these circumstances prepared to say that Zacharia had acquired a Singapore domicile.

Certain decisions of the Bombay High Court were relied upon by Mr. Ramaswami Iyer for the plaintiff but these are not suits for recovery of immoveable property. We have not been referred to any authority where the right of a foreign administrator to recover immoveable property has been recognised.

Another objection taken to the maintainability of the suit by the plaintiff is that he is an undischarged bankrupt. We have already referred to the fact that at the instance of the second defendant he was adjudged bankrupt by the Singapore Court as early as 1927. It has not been shown that he has since been discharged. But this will not affect his right to file the suit as the administrator of the estate of his father which right does not vest in the assignee in his bankruptcy. But as we have already said in his capacity as the administrator of his father's estate, the suit does not appear to lie.

The suit however is laid in the alternative as one on behalf of a creditor of the second defendant. It is not disputed that over Rs. 50,000 is due to the estate of Zacharia from the second defendant. Zacharia's estate is therefore a creditor of the second defendant. All the heirs-at-law of Zacharia are made parties to the suit. It is not said that there are any other heirs in addition to the plaintiff and defendants 3 to 6. The suit can therefore be regarded as one filed on behalf of the heirs of the deceased Zacharia.

Thus viewed the plaintiff would only be one of Zacharia's heirs suing in his personal capacity. It would then be certainly open to the objection that whatever right he had to a share in the sum of Rs. 50,000 just mentioned would vest in the Official Assignee in his bankruptcy and a suit by him if it stood alone would have been incompetent. But the suit is professedly laid on behalf of the plaintiff and defendants 3 to 6. In this Court the widow of the deceased Zacharia has been transposed as an appellant in A. S. No. 257 by an order of Happell, J., in C. M. P. No. 4600 of 1944 on the 13th November, 1944. There is therefore no objection to the maintainability of the suit. We would have been prepared, if the matter had not been set right by the order just mentioned, to allow the third defendant to be transposed as a plaintiff.

The next objection taken is that a creditor of an insolvent is not entitled to file a suit against persons situated in the position of the seventh and ninth defendants without the leave of the Insolvency Court. The argument of Mr. Ramachandra

Iyer who appears for these defendants is that the plaintiff or the third defendant is only a creditor in the insolvency of the second defendant, that a suit to set aside an alienation made in favour of the ninth defendant by the insolvent is one which cannot be maintained without the leave of the Insolvency Court. As regards the suit against the seventh defendant it is said that the plaintiff's claim is that it is the property of the insolvent and that this was also within the prohibition contained in the rule that certain suits can be filed by the creditors only with leave of the Insolvency Court. The rule is laid down in section 17 of the Presidency Towns Insolvency Act, and section 28 of the Provincial Insolvency Act. It is conceded that the law is the same even in Singapore. On the making of the order of adjudication all the properties of the insolvent vest in the Official Receiver or the Official Assignee and thereafter no creditor to whom the insolvent is indebted in respect of any debt provable under the bankruptcy law shall, during the pendency of the insolvency proceedings, have any remedy against the property of the insolvent except with the leave of the Court and on such terms as the Court may impose.

As regards the ninth defendant the claim against him is that the alienation made by the insolvent in his favour in November, 1930, is void against the Official Assignee and against the creditors of the insolvent. Thus the property was not the property of the insolvent at the time the insolvency petition was filed. The title had validly passed from the insolvent to the alienee. It was only subject to being avoided by the Official Assignee in the bankruptcy proceedings or by the creditors under section 53 of the Transfer of Property Act. Therefore the suit is not against the property of the insolvent but is one really against a third party and against the property in the hands of the third party and the object of the suit is to secure the property for the benefit of the general body of creditors. When the suit succeeds the property will be taken possession of by the Official Assignee and he will administer the estate for the benefit of the creditors. In such a case leave of the insolvency Court is not necessary. This has been settled by a Full Bench of this Court in *Chidambaram Chettiar* v. *Sellakumara Goundan*[1]. The matter was referred to a Full Bench as there was some slight difference of opinion on this question and the Full Bench has answered the question in favour of the maintainability of such a suit. The point referred for the decision of the Full Bench is stated at page 6 of the report thus:

"Is a suit by a creditor under section 53 of the Transfer of Property Act, to set aside an alienation made by the debtor before he is adjudged an insolvent maintainable without the leave of the Insolvency Court?"

Having regard to the considerations set out above the learned Judges held that the suit does not require the leave of the Insolvency Court.

Turning to the case of the seventh defendant, it is no doubt true that the claim of the plaintiff is that the property in her hands is the property of the insolvent taken in the name of the seventh defendant. This case is not directly covered by the Full Bench decision referred to. But we have to see nevertheless whether this is a suit against the property of the insolvent in respect of the debt. This is certainly not a suit against the property of the insolvent and the plaint does not ask any relief against the property of the insolvent. Further the creditor does not directly seek a relief against this property for his own benefit. The decree when granted to the plaintiff or to the third defendant who is now transposed as the plaintiff will enure for the benefit of the Official Assignee in the bankruptcy of the second defendant and will have to be administered by him. In fact the decree of the lower Court is that the plaintiff's interest in this decree do vest in the first defendant, the Official Assignee administering the estate of the second defendant. Pursuing the line of reasoning adumberated in the judgment of the Full Bench, it is only those suits that seek relief against the property of the insolvent and which were admittedly the insolvent's property at the date of the insolvency petition that would require leave of the Insolvency Court. The property is claimed by the seventh

1. (1941) 2 M.L.J. 684: I.L.R. (1942) Mad. 1 (F.B.).

defendant to belong to herself. That position has been accepted by second defendant and acquiesced by him; in fact both second and seventh defendants being husband and wife sail together. This is therefore a case in which steps have to be taken before the estate can be said to vest in the Official Assignee in the bankruptcy of the second defendant. There is, therefore, apparently no reason why a suit for a declaration that the property standing in the name of a third party is really that of the insolvent and not that of a third party should not lie at the instance of a creditor. This does not come within the rule laid down within section 28 of the Provincial Insolvency Act and section 17 of the Presidency Act.

The next objection taken is that viewed as a suit by a creditor under the principles laid down under section 53 of the Transfer of Property Act leave under Order I, rule 8 has not been obtained. It is argued that the suit must be on behalf of all the creditors, but we find that the suit is really on behalf of all the creditors. All the creditors of the second defendant in the Singapore insolvency are represented by the Official Assignee of Singapore and the first defendant, the Official Assignee of Madras, is acting as his auxiliary. Therefore, the first defendant really represents his principal, the Official Assignee of Singapore and that officer represents all the creditors of the second defendant. P. W. 1 has deposed that there are no creditors of the second defendant in British India and this is not even controverted. Thus all the creditors of the second defendant are parties to this suit. The conditions laid down in section 53 that the suit should be on behalf of all the creditors apply only to a case where all the other creditors are not made parties to the suit. In such a case, the suit must be a representative action, and the necessary leave of the Court under Order 1, rule 8 must be obtained. The absence of leave under Order 1, rule 8 upon which much stress has been laid is really beside the point, because Order 1, rule 8 only applies where some persons out of a large body of persons entitled to file a suit desire to conduct proceedings on behalf of themselves and on behalf of the absentee parties; but when all the persons jointly interested are made parties, Order 1, rule 8 does not apply, and there is no need to apply for the leave of the Court under that rule. That objection also fails.

The next objection taken is that the suit is barred by limitation. As regards the seventh defendant this objection does not seem to us to have any force. So far as she is concerned, there is no proof that she claimed any interest adverse to that of her husband more than twelve years before the date of suit. Mr. Ramachandra Iyer, her learned advocate, referred to certain maintenance proceedings of 1933. But taking it from that time the possession of the wife was adverse, that commenced only in the year 1933 and the suit was filed in 1940. The husband was always living in Singapore. He was sending moneys to India and the properties were purchased in the name of his wife, the seventh defendant. She being on the spot was in management of the properties. Under these circumstances, there is no reason to suppose that the seventh defendant was holding the property otherwise than on behalf of her husband, the real owner. There is no question of adverse possession, at any rate until 1933 when alone we have some disputes between the husband and the wife.

As regards the claim of the ninth defendant that the suit is likewise barred, the first answer is that no decree has been given for possession. Further, the argument that the suit is barred under Article 120, viewing it as one for possession is again devoid of substance. Under Article 120, there is a period of six years from the time when the cause of action accrues. The cause of action will accrue admittedly either on the date when the plaintiff came to know of the alienation or even later at the time when he chose to avoid the alienation. It is unnecessary to decide which of these two views is correct, but taking it that the earlier point of time when the plaintiff came to know is the starting point of limitation, we have nothing in this case that the plaintiff knew of the alienation in favour of the ninth defendant at a point of time which is more than six years before the date of suit. In the written statement filed by the ninth defendant, there is no allegation that the plaintiff knew of the alienation in his favour more than six years before suit.

Lastly it is argued that under Ex. P-3 all the right which the estate of Zacharia had against the properties in India other than those covered by paragraph 7 thereof was given up and that therefore this suit cannot be laid against the properties in the possession of the seventh defendant. A number of answers were given by Mr. Ramaswami Iyer for the plaintiff, but we are content to put the position thus: Paragraph 9 of Ex. P-3 says that neither party was to have any claim *against the other* over any of the properties either in Singapore or in India save as therein mentioned. Clause 9 does not give up the right of the estate of Zacharia against the seventh defendant. It is only against the second defendant who was a party to the document and who therefore comes under the expression " against the other " that clause 9 of Ex. P-3 would at all operate. We therefore think it unnecessary to deal with the other contentions of Mr. Ramaswami Iyer, one of which is that the compromise must be viewed as a whole, that the consideration for clause 9 is really the provisions contained in the other paragraphs of the document and that when the provisions laid down in all the other paragraphs were admittedly given up and substituted for the arrangement contained in Ex. P-4, the provision made in clause 9 must also be taken to have been superseded. Further, the claim that we have upheld is not the claim of Zacharia's estate to the properties themselves, but it is the claim of the second defendant's creditor that we have upheld. Any other creditor, for instance, of the second defendant, would have certainly a right to have it declared that the property in the hands of the seventh defendant is available for the second defendant's creditors. It is this right that is now recognised and we see no reason why clause 9 of Ex. P-3 should stand in the way of this right being recognised.

One other answer attempted by Mr. Ramaswami Iyer is that clause 9 would require registration. It is said that the properties claimed by the seventh defendant are immoveable properties worth over Rs. 100 and that a release or relinquishment of the rights of Zacharia's estate over this property can be made only by a registered instrument. It is urged on the other side that having been embodied in a compromise decree, no registration was required before 1930 when decrees were also brought under the category of compulsorily registrable documents by the amending Act of 1929. But it is unnecessary to go into this question either.

In the result, all the appeals fail.

Appeal No. 257 is dismissed with costs of respondents 8 and 9. Appeal No. 304 is dismissed. Appeal No. 417 is dismissed with costs of respondents 5 to 7.

Appeal No. 417 has been filed *in forma pauperis*. There will be a direction that the appellant do pay the Court-fee payable to Government on the memorandum of appeal.

B.V.V. *Appeals dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Federal Court of India.)

PRESENT :—LORD CHANCELLOR, LORD THANKERTON, LORD PORTER, LORD GODDARD AND SIR MADHAVAN NAIR.

Emperor ... *Appellant**

v.

Sibnath Banerji and others ... *Respondents.*

Government of India Act (1935), *sections* 205 *and* 208 *and Criminal Procedure Code* (V *of* 1898), *sections* 491 *and* 404—*Appeal against a discharge or order directing discharge under a writ of* habeas corpus—*Competency—Comparison of English and Indian Law—Defence of India Act* (1939), *section* 2 (1) *and* (2) *and Defence of India Rules* (1939), *rule* 26—*Relative scope and effect of sub-sections* (1) *and* (2) *of section* 2 *of the Defence of India Act—Rule* 26 *if in conformity with powers conferred by sub-section* (1) *of section* 2 *of the Defence of India Act—Government of India Act, section* 59 (2) *and Defence of India Act, section* 16 (1)—*Jurisdiction of the High Court to investigate the validity of orders of detention under rule* 26 *of the Defence of*

---

* P.C. Appeal No. 44 of 1944. 17th July, 1945.

India Rules—Defence of India Act, section 2 (5)—*Scope and effect of—Government of India Act, sections* 49 (2) *and* 124 (4)—*Construction—Scope and effect—Mode of dealing with matters which could be dealt with by the Governor under rule* 26 *of the Defence of India Rules—"Executive"—Meaning—Home Minister, an officer subordinate to the Governor within the meaning of section* 49 (1) *of the Government of India Act—Validity of routine orders of detention.*

Upon applications under section 491, Criminal Procedure Code, for directions in the nature of *habeas corpus* on behalf of persons detained in various jails in pursuance of orders made under rule 26 of the Defence of India Rules, orders and judgments were passed by the High Court directing the release of the applicants. On the application of the Crown, the High Court granted certificates under section 205 of the Constitution Act for leave to appeal to the Federal Court against such orders and judgments. After the decision of the Federal Court, leave was given by them under section 208 (*b*) of the Act to appeal to His Majesty in Council. On the question of the competency of the appeals to the Federal Court and Privy Council in such matters,

Held, that it is a known and well-settled principle of English Law, that a discharge, or an order directing discharge, under a writ of *habeas corpus* is final and not subject to appeal. The condition of the law of *habeas corpus* in India and the purpose and express words of section 205 of the Constitution Act, afford a contrast to the condition of the English Law and the object and general terms of section 19 of the Judicature Act of 1873.

There is no provision in the Code of Criminal Procedure for an appeal from an order made under section 491, Criminal Procedure Code; there is no conviction or acquittal in such proceedings. Accordingly, as regards appeal, the position under the Criminal Procedure Code, as to proceedings under section 491 is in effect the same as the position stated in *Cox* v. *Hakes*, (1890) 15 A.C. 506.

Section 205 of the Constitution Act relates to both the Civil and Criminal Jurisdiction of the High Court and its language is strikingly wide. In the absence of an express exception of *habeas corpus* cases and in view of the terms and purposes of section 205, the terms of that section cannot be limited by mere construction so as to exclude such cases from its operation. Accordingly, section 205 of the Act of 1935 provides one of the exceptions referred to in section 404 of the Criminal Procedure Code. In view of the special terms of section 205, the appeals from the High Court in such cases were competent, with the result that the appeals to His Majesty in Council were also competent.

The function of sub-section (2) of section 2 of the Defence of India Act is merely an illustrative one; the rule-making power is conferred by sub-section (1), and the "rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1). The language of sub-section (1) of section 2 of the Defence of India Act amply justifies the terms of rule 26 of the Defence of India Rules and the latter rule is made in conformity with the powers conferred by that sub-section. *Keshav Talpade* v. *The King-Emperor*, (1943) 2 M.L.J. 90: 1943 F.C.R. 49, overruled.

It cannot be said that the High Court has no jurisdiction in view of section 59 (2) of the Constitution Act and section 16 (1) of the Defence of India Act to investigate the validity of orders of detention made under rule 26 of the Defence of India Rules. Such a contention goes too far. Sub-section (2) of section 59 of the Act of 1935 only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor; and sub-section (1) of section 16 of the Defence of India Act which assumes that the order is made in the exercise of the power clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred. In either case, no doubt, the burden of proof lies heavily on the challenger to produce admissible evidence sufficient to establish a *prima facie* case as to the inaccuracy of the recitals in the orders of detention.

Sub-section (5) of section 2 of the Defence of India Act is merely supplementary and affords no ground for excluding the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chapter II of Part 3 of the Constitution Act. The provisions of that chapter as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such a decision. Sub-section (2) of section 49 of the Act of 1935 does not limit the operation of the section to matters with respect to which the Provincial Legislature has power to make laws. It has to be construed as providing an extensible limit and not a maximum limit, and the provisions of sub-section (2) of section 124 of the Act as affording a means of such extension. Therefore, such matters as those which fell to be dealt with by the Governor under rule 26 of the Defence of India Rules could be dealt with by him in the normal manner in which the executive business of the Provincial Government is carried on under the provisions of Chapter II of Part 3 of the Act of 1935, and in particular, under the provisions of section 49 and the rules of business made under section 59.

The Home Minister is an officer subordinate to the Governor within the meaning of section 49 (1) of the Act. *Emperor* v. *Hemendra Prasad Ghosh*, I.L.R. (1939) 2 Cal. 411, (S. B.), overruled.

The provisions of sub-section (5) of section 2 of Defence of India Act do not provide the only means by which the Governor can relieve himself of a strictly personal function.

Sub-section (5) of section 2 of the Defence of India Act provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter whereas under section 49 (1) of the Act of 1935 the Governor remains responsible for the action of his subordinates taken in his name.

Sir Walter Monckton, K.C., W. Wallach and *B. Mc Kenna* for Appellant.

D. N. Pritt, K.C. and *V. K. Krishna Menon* for Respondents.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—This appeal is brought by leave of the Federal Court of India from a judgment of that Court[1] (Spens, C. J., Varadachariar and Zafrulla Khan, JJ.), dated the 31st August, 1943, dismissing eight appeals by the Crown against orders and judgments of a Divisional Bench of three Judges (Mitter and Sen, JJ., Khundkar, J., dissenting) of the High Court[2] of Judicature at Fort William in Bengal, dated the 3rd June, 1943.

The orders and judgments of the High Court were made upon applications under section 491 of the Criminal Procedure Code for directions in the nature of *habeas corpus* on behalf of nine persons, detained in various jails in pursuance of orders made under rule 26 of the Defence of India Rules on various dates from 24th October, 1940, to 8th March, 1943. These orders and judgments directed the release of the applicants. Of the nine original applicants eight are called as respondents in the present appeal, but their Lordships were informed that two of the respondents had been released, namely, Narendra Nath Sen Gupta, respondent No. 4, on a date before the judgment of the Federal Court, and Bijoy Singh Nahar, respondent No. 2, after the judgment of the Federal Court. The remaining six respondents with whom this appeal is now concerned, are under detention by virtue of orders made under Bengal Regulation III of 1818.

Having regard to the known and well-settled principle of the English law that a discharge, or an order directing discharge, under a writ of *habeas corpus* is final and not subject to appeal, and the importance of preserving safeguards of the liberty of the subject, their Lordships asked for arguments of counsel on the competency, in the present case, of the appeals by the Crown from the High Court to the Federal Court, which might equally affect the competency of the further appeal to this Board. It is sufficient to refer to the decision of the House of Lords in *Cox* v. *Hakes*[3], where the law of England on this matter is fully dealt with.

In the present case, the appeals have proceeded under sections 205 and 208 of the Government of India Act, 1935. Section 205 provides as follows:

"205. (1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council, if no such certificate has been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

On the application of the Crown the High Court granted certificates under section 205 (1) for leave to appeal to the Federal Court. After the decision of the Federal Court, leave was given by them under section 208 (*b*) to appeal to His Majesty in Council.

Their Lordships have come to the conclusion that, in view of the special terms of section 205, the appeals in the present case were competent.

In *Cox* v. *Hakes*[3], it was held that the right of appeal given by section 19 of the Judicature Act, 1873, did not include an appeal against an order of discharge made upon a writ of *habeas corpus*. Lord Halsbury, L.C., says:

"My Lords, I have insisted at some length upon the peculiarities of the procedure, because I think one cannot suppose that the Legislature intended to alter all the procedure by mere general words without any specific provision as to the practice under the writ of *habeas corpus* or the statutes which from time to time have regulated both its issue and its consequences. My Lords, I do not deny, that the words of section 19 literally construed are sufficient to comprehend the case

1. (1943) 6 F.L.J. 151 : (1943) 2 M.L.J. 468.
2. (1943) 47 C.W.N. 802 ; A.I.R. 1943 Cal. 377 (S.B.).
3. (1890) 15 A. C. 506.

of an order of discharge made upon an application for discharge upon a writ of *habeas corpus*; but it is impossible to contend that the mere fact of a general word being used in a statute precludes all enquiry into the object of the statute or the mischief which it was intended to remedy."

In their Lordships' opinion, the condition of the law of *habeas corpus* in India, and the purpose and express words of section 205 of the Government of India Act, 1935, afford a contrast to the condition of the English law and the object and general terms of section 19 of the Judicature Act of 1873. The history of the matter is shortly stated by Sir George Rankin, then Chief Justice, in his admirable judgment in *Girindra Nath Banerjee* v. *Birendra Nath Pal*,[1] from which the following quotation may be made (at page 749):—

"I proceed therefore to enquire whether according to the law in India as it now stands there is or is not power in the High Court to grant the writ of *habeas corpus* at common law independently of section 491 of the Criminal Procedure Code. Now in 1870 in the case of *Ameer Khan*[2], Mr. Justice Norman held that the High Court could issue the *habeas corpus* outside the Original Jurisdiction to the Superintendent of the Jail at Alipore. In 1872, the Code of Criminal Procedure (Act X of 1872) was enacted which gave the right to European British subjects detained in custody, whether within the limits of the High Court's original jurisdiction or outside those limits to apply for an order directing the person detaining him to bring him before the High Court, in other words for an order under section 81 in the nature of *habeas corpus*. Section 82 provided that 'Neither the High Courts nor any Judge of such High Courts shall issue any writ of *habeas corpus*, *Main prise*, *De homine replegiando* nor any other writ of the like nature beyond the Presidency towns.' This prohibition cannot in my opinion be confined to the case of European British subjects nor has this been contended before us. In 1875, the High Courts' Criminal Procedure Act (X of 1875) in section 148 set out various purposes for which an order in the nature of *habeas corpus* might be made and it gave power to the High Courts to make such orders in the case of persons within the limits of their original jurisdiction. It went on to say that 'neither the High Court nor any judge thereof shall hereafter issue any writ of *habeas corpus* for any of the above purposes.' Certain particular matters were excepted, it being stated that nothing in this section applies to a person detained under Bengal Regulation III of 1818 and certain other Regulations. But it is quite clear that for the purposes provided for by section 148, the intention was that relief should be granted under the section and recourse should not be had to the old prerogative writs . . . . The subsequent history of the matter is shortly this, that when the Code of Criminal Procedure was amended in 1882, the Acts of 1872 and 1875 were comprised in Schedule I as enactments repealed by section 2 'but not so as to restore any jurisdiction or form of procedure not existing or followed' on the 1st January, 1883 (Act X of 1882). The matter remained very much in the same position until 1923, when a right was given to everybody within the appellate jurisdiction of this Court to make an application under section 491 of the present Criminal Procedure Code. The question which arises is whether for any of the purposes mentioned in what is now section 491, it is open to an applicant still to say that he will make his application independently of that section altogether for the prerogative writ of *habeas corpus* on the civil side of the High Court. I observe that it has been stated in certain cases that if there is to be any question of the abolition of this right then the Legislature must say so in the most specific terms. Whether that be a correct view in a matter of procedure of this kind need not be discussed for the Legislature has used the most specific terms; and it is plain that the Indian Legislature never intended that the Courts in giving relief of this character should for any of the purposes mentioned in section 491 be at liberty to act under it or under the old procedure."

In the recent case of *Matthen* v. *District Magistrate, Trivandrum*[3], this judgment was approved by the Board, and it was held that, in cases covered by section 491 the power to issue a common law writ of *habeas corpus* in British India had been taken away by legislation, and the powers conferred by section 491, substituted therefor. The present applications were under section 491. Under section 404 of the Criminal Procedure Code no appeal lies from any judgment or order of a Criminal Court except as provided for by the Court or by any other law for the time being in force. There is no provision in the Code for an appeal from an order made under section 491, there is no conviction or acquittal in such proceedings, and section 417, which taken along with the new section 411-A (2), enacted by section 2 of the Amending Act of 1943 (Act XXVI of 1943) allows an appeal on behalf of the Government only from an order of acquittal is equally inapplicable. Accordingly, as regards appeal, the position under the Criminal Procedure Code as to proceedings under section 491 is in effect the same as the position stated in *Cox* v. *Hakes*[4].

1. (1927) I. L. R. 54 Cal. 727.
2. (1870) 6 B. L. R. 392.
3. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. (1939) Mad. 744 (P.C.).
4. (1890) 15 A. C. 506.

Turning again to section 205 of the Government of India Act of 1935, their Lordships are clearly of opinion that the section relates to both the civil and criminal jurisdiction of the High Courts; the terms of sub-section (2) of section 210 appear to put this beyond doubt, and their Lordships agree with the decision of the Federal Court to this effect in *Hori Ram Singh* v. *The Crown*[1]. Further the width of the language used is striking, *viz.*, "any judgment, decree or final order of a High Court", and " it shall be the duty of every High Court in British India to consider in every case." The purpose of the provision is to confer a right of appeal in every case that involves a substantial question of law as to the interpretation of the Act or any Order in Council made thereunder. The object is clearly to secure uniformity of decision in every High Court by the determination of a Court superior to them all. On the most moderate view of the matter, the securing of that object is at least as important in cases of *habeas corpus* in which such questions are very apt to arise, as in other cases. In the absence of an express exception of *habeas corpus* cases, and having in view the terms and purpose of the section, their Lordships are unable to limit the terms of the section by mere construction so as to exclude these cases from its operation. Accordingly, section 205 of the Act of 1935 provides one of the exceptions referred to in section 404 of the Criminal Procedure Code.

Their Lordships are therefore of opinion that the appeals from the High Court were competent and it follows that the appeal to His Majesty in Council was also competent, and they will proceed to deal with the appeal on the merits.

The present applications under section 491 of the Criminal Procedure Code were filed on the 24th April, 1943, two days after the decision of the Federal Court in *Keshav Talpade* v. *The King-Emperor*[2] under which it was held, reversing the decision of the Bombay High Court refusing to make an order under section 491 for release of the applicants, that rule 26 of the Defence of India Rules was *ultra vires*, and was not warranted by the Defence of India Act, 1939. On the 28th April, 1943, the Governor-General made and promulgated Ordinance No. XIV of 1943, under section 72 of the Ninth Schedule of the Government of India Act, 1935. By section 2 of the Ordinance a new clause was substituted for clause (*x*) of section 2 (2) of the Defence of India Act, 1939. Section 3 of the Ordinance provided " that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under section 2 of the Defence of India Act, 1939." The amendment effected by section 2 of the Ordinance removed the grounds on which the Federal Court had pronounced rule 26 to be *ultra vires*. The terms of rule 26 were not altered by the Ordinance.

In the present applications, *Talpade's case*[2] was taken as binding on them by both the High Court and the Federal Court and the new Ordinance No. XIV was the main object of challenge by the applicants. But before this Board, the Crown has placed in the forefront a challenge of the correctness of the decision in *Talpade's case*[2], and success in that contention would vindicate the validity of rule 26 and would supersede any consideration of Ordinance No. XIV. It is therefore necessary to dispose of this question first.

The material portions of section 2 of the Defence of India Act, 1939 (Act XXXV of 1939), as amended by section 2 of the Defence of India (Amendment) Act, 1940 (Act XIX of 1940), are as follows:

"2. (1) The Central Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

---

1. (1939) 2 M.L.J. Supp. 23 : 2 F.L.J. 153 : (1939) F.C.R. 159.
2. (1943) 2 M.L.J. 90 : I.L.R. (1944) Bom. 183 : (1943) F.C.R. 49 : 6 F.L.J. 28.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, or may empower any authority to make orders providing for all, or any of the following matters, namely :—

* * * * * * * * *

(v) preventing the spreading without lawful authority or excuse of false reports or the prosecution of any purpose likely to cause disaffection or alarm, or to prejudice His Majesty's relations with foreign powers or with States in India, or to prejudice the maintenance of peaceful conditions in the tribal areas, or to promote feelings of enmity and harted between different classes of His Majesty's subjects :

* * * * * * * *

(x) the apprehension and detention in custody of any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything."

The material part of rule 26, as it has stood since 1940, is as follows :—

"26. (1) The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to prevent him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war it is necessary so to do, may make an order.

(a) . . . .
(b) directing that he be detained."

In *Talpade's case*[1] the judgment of the Federal Court was delivered by Gwyer, C.J., who first dealt with the main argument of the appellant, which had been rejected by the High Court, and proceeded at p. 206 :

"We, therefore, reject the main argument addressed to us on behalf of the appellant and, if there were nothing more in the appeal, we should dismiss it without further discussion. There is, however, another aspect of the case, which was not argued until the Court itself drew the attention of counsel to it; for it seemed to us that it was open to question whether rule 26 itself in its present form was within the rule-making powers conferred by the Defence of India Act. If it is not within those powers then it must be held void and inoperative either in whole or in part; and the orders made under it will be similarly open to challenge."

The learned Judge then proceeded to discuss paragraphs (v) and (x) of section 2 (2) of the Act, and for reasons fully stated by him, he came to the conclusion that rule 26 was not within the powers conferred by sub-section 2 of section 2 and he stated (page 214) :

"The Legislature having set out in plain and unambiguous language in paragraph (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to pray in aid the more general words in section 2 (1) in order to justify a rule which so plainly goes beyond the limits of paragraph (x); though if paragraph (x) were not in the Act at all, perhaps different considerations might apply . . . . We are compelled therefore to hold that rule 26 in its present form goes beyond the rule-making powers which the Legislature has thought fit to confer upon the Central Government and is for that reason invalid."

Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of section 2 of the Defence of India Act and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that rule 26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorised by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt—as the learned Judge himself appears to have thought—that the general language of sub-section (1) amply justifies the terms of rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

Their Lordships are therefore of opinion that *Talpade's case*[1] was wrongly decided by the Federal Court, and that rule 26 was made in conformity with the powers conferred by sub-section (1) of section 2 of the Defence of India Act. It is,

1. (1943) 2 M.L.J. 90: I.L.R. (1944) Bom. 183: (1943) F.C.R. 49; 6 F.L.J. 28.

accordingly, unnecessary for their Lordships to consider whether rule 26 was not also within paragraphs (*v*) and (*x*) of sub-section (2) of section 2, contrary to the opinion of the Federal Court and their Lordships express no opinion on the matter. As already stated, their Lordships are also relieved from any consideration of Ordinance XIV of 1943.

As regards the remaining questions, counsel for the Crown stated them under two main heads, *viz.*, 1st whether the orders of detention can be questioned in view of the provisions of section 59 (2) of the Government of India Act and section 16 of the Defence of India Act, and secondly, assuming that they can be so questioned, whether there were materials on which the Courts below could properly decide that the orders were not made in conformity with rule 26.

The order for detention of respondent No. 1, which is typical of the other cases, is as follows :

"Calcutta, the 27th October, 1942.

Whereas the person known as Shibnath Banerjee M.L.A., son of late Dwariknath Banerjee of 3/1 Kali Banerjee Lane, Howrah, is detained in the Howrah Jail under the provision in rule 129 of the Defence of India Rules;

And whereas the Governor is satisfied that, with a view to preventing the said person from acting in any manner prejudicial to the Defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the War, it is necessary to make the following orders to continue his detention ;

Now, therefore, in exercise of the powers conferred by clause (*b*) of sub-rule (1) and sub-rule (5) of rule 26 of the Defence of India Rules, the Governor is pleased to direct—

(*a*) that the said person shall until further orders be detained ;

(*b*) that until further orders the said person shall continue to be detained in the Howrah Jail ; and

(*c*) that during such detention the said person shall be subject to the conditions laid down in the Bengal Security Prisoners Rules, 1940.

By order of the Governor,
S. B. Bapat.
Additional Deputy Secretary to the Government of Bengal."

Except that in the case of respondent No. 6, Niharendu Dutt Majumdar, there was no previous arrest under rule 129, and that in some cases the order was signed on behalf of the Governor by " A. E. Porter, Addl., Secy., to the Govt. of Bengal," there is no material difference from the above order in the case of the remaining orders. The Crown maintained that the orders being on their face, regular and in conformity with the language of the rule, it was not open to the Court to investigate their validity any further, and relied on the statutory provisions already referred to. It should, however, be stated, that rule 3 (1) of the Defence of India Rules provides that the General Clauses Act, 1897, is to apply to the interpretation of these rules as it applies to the interpretation of a Central Act, and that, under section 3 (43a) of the General Clauses Act,

" (43-a) 'Provincial Government,' as respects anything done or to be done by the ' Provincial Government ' after the commencement of Part III of the Government of India Act, 1935, shall mean—

(*a*) in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act . . . ."

Section 59 (2) of the Government of India Act, on which the Crown relies, provides :

" Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor."

In the opinion of their Lordships, the contention of the Crown goes too far, as the sub-section only relates to one specified ground of challenge, namely, that the order or instrument was not made or executed by the Governor. Their Lordships agree with the statement by the learned Chief Justice of the Federal Court, *viz.*,

"It is a quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where that recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenue to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate."

On this point the Federal Court was unanimously against the Crown. The other statutory provision relied on by the Crown before the Board was not, it appears, brought before the Federal Court; it was section 16 of the Defence of India Act, which provides as follows:

"16.—(1) No order made in exercise of any power conferred by or under this Act shall be called in question in any Court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a Court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority."

Sub-section (1) assumes that the order is made in exercise of the power, which clearly leaves it open to challenge on the ground that it was not made in conformity with the power conferred, heavily though the burden of proof may lie on the challenger, as stated by the Chief Justice in the passage just cited. Sub-section (2) raises a presumption of fact, which may be displaced, though here again the burden is likely to be heavy. Section 4 of the Indian Evidence Act provides:

"Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved unless and until it is disproved."

Accordingly, the contention of the Crown that the Court has no jurisdiction to investigate the validity of the orders fails.

On construction of rule 26, the majority of the Judges of the Federal Court held that the Governor must be personally satisfied as to the matters therein set out, and that, in view of the admission by the Crown that in none of the cases before them had the Governor himself considered the case, the orders for detention were not in conformity with the rule. They based their conclusion mainly on the power of delegation (which has admittedly not been exercised in the present case) conferred by sub-section (5) of section 2 of the Defence of India Act, which provides as follows:

"(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-section (1) is conferred or imposed on the Provincial Government or which, being by such rule conferred or imposed on the Central Government has been directed under sub-section (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government."

The learned Chief Justice disagreed, holding that sub-section (5) was merely supplementary and afforded no ground for excluding the ordinary methods by which the Provincial Government's executive business was authorised to be carried on by Chapter II of Part III of the Government of India Act, 1935. Their Lordships are of opinion that the learned Chief Justice was right. It will be remembered that the definition of Provincial Government in section 3 (43a) of the General Clauses Act refers one to the provisions of the Government of India Act for the action or non-action of the Governor, and this takes one to Chapter II of Part III, which is headed "the Provincial Executive—The Governor." The material sections are as follows:

"49.—(1) The executive authority of a Province shall be exercised on behalf of His Majesty by the Governor, either directly or through officers subordinate to him, but nothing in this section shall prevent the Federal or the Provincial Legislature from conferring functions upon subordinate authorities or be deemed to transfer to the Governor any functions conferred by any existing Indian law on any Court, Judge, or officer or any local or other authority.

2. Subject to the provisions of this Act, the executive authority of each Province extends to the matters with respect to which the Legislature of the Province has power to make laws."

"50.—(1) There shall be a council of ministers to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Act required to exercise his functions or any of them in his discretion.

Provided that nothing in this sub-section shall be construed as preventing the Governor from exercising his individual judgment in any case where by or under this Act he is required so to do.

(2) The Governor in his discretion may preside at meetings of the Council of ministers.

(3) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Act required to act in his discretion or to exercise his individual judgment, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion, or ought or ought not to have exercised his individual judgment."

"52. (1) In the exercise of his functions the Governor shall have the following special responsibilities, that is to say :—

(a) the prevention of any grave menace to the peace or tranquillity of the Province or any part thereof; . . . .

(3) If and in so far as any special responsibility of the Governor is involved, he shall, in the exercise of his functions, exercise his individual judgment as to the action to be taken."

"59.—(1) All executive action of the Government of a Province shall be expressed to be taken in the name of the Governor.

(Sub-section (2), already quoted).

(3) the Governor shall make rules for the more convenient transaction of the business of the Provincial Government, and for the allocation among ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Act required to act in his discretion.

(4) The rules shall include provisions requiring ministers and secretaries to Government to transmit to the Governor all such information with respect to the business of the Provincial Government as may be specified in the rules, or as the Governor may otherwise require to be so transmitted, and in particular requiring a minister to bring to the notice of the Governor, and the appropriate secretary to bring to the notice of the minister concerned and of the Governor, any matter under consideration by him which involves, or appears to him likely to involve, any special responsibility of the Governor.

(5) In the discharge of his functions under sub-sections (2), (3) and (4) of this section the Governor shall act in his discretion after consultation with his ministers."

Rules of business have been framed by the Governor of Bengal under section 59, under which it is not disputed that questions of detention fall to be transacted in the Home Department. Under rule 12 all orders or instruments made or executed by or on behalf of the Government of Bengal are to be expressed to be made by or by order of the Governor of Bengal; and under rule 13 save in cases of special authorisation, every order or instrument of the Government of Bengal is to be signed by either a Secretary (an Additional Secretary), a Joint Secretary, a Deputy Secretary, an Under-Secretary, or an Assistant Secretary to the Government of Bengal, and such signatures are to be deemed to be the proper authentication of such orders or instruments.

In the first place, their Lordships observe that the provisions of Chapter II of Part III of the Act of 1935 as to the Provincial Executive and its executive authority use the term "executive" in the broader sense as including both a decision as to action and the carrying out of such decision.

Counsel for the respondents submitted a contention which the majority of the learned Judges in the Federal Court had accepted, based on sub-section (2) of section 49 of the Act of 1935, to the effect that the sub-section limited the operation of the section to matters with respect to which the Provincial Legislature has power to make laws, and that the subject matter of the Defence of India was not within those powers. The learned Judges, in confirmation of this view, referred to sub-section (2) of section 124, which provides that :

"an Act of the Federal Legislature may, notwithstanding that it relates to a matter with respect to which a Provincial Legislature has no power to make laws, confer powers and impose duties or authorise the conferring of powers and the imposition of duties upon a Province or officers and authorities thereof."

Their Lordships are unable to agree with such a narrow reading of these provisions which would involve the necessity of the Federal Legislature making provision in each case for the executive machinery to carry out the powers and duties so imposed, instead of using the existing Provincial machinery. This view is supported by sub-section (4) of section 124, which provides *inter alia* that where an Act of the Federal Legislature, by virtue of sub-section (2) confers powers and imposes duties upon a Province or officers and authorities thereof in relation to a matter with respect

to which a Provincial Legislature has no power to make laws, the Federation is to pay to the Province such sum as is agreed, or determined by arbitration, in respect of any extra costs of administration incurred by the Province in connection with exercise of those powers and duties. This appears to contemplate extra costs incurred by the existing machinery of Provincial Administration. Their Lordships construe sub-section (2) of section 49 as providing an extensible limit and not a maximum limit, and the provisions of sub-section (2) of section 124 as affording a means of such extension. But, further, their Lordships construe the incorporation of the General Clauses Act, both in the Defence of India Act, and in the Defence of India Rules, with its reference in section 3 (43a) to the provisions of Part III of the Act of 1935 as to the acting or non-acting of the Provincial Governor, as necessarily embodying the relevant provisions of Chapter II of Part III, including in particular section 49.

It is for the same reasons that their Lordships are unable to accept the respondents' contention, also agreed to by the majority Judges in the Federal Court, that the provision of sub-section (5) of section 2 of the Defence of India Act, provides the only means by which the Governor can relieve himself of a strictly personal function. Their Lordships would also add, on this contention, that sub-section (5) of section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of the power or duty to the officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under section 49 (1) of the Act of 1935, the Governor remains responsible for the action of his subordinate taken in his name.

The respondents next contended that, assuming that section 49 did apply, this question was one which involved a special responsibility of the Governor within the meaning of section 52 (1) (a) of the Act of 1935, and therefore required the individual judgment of the Governor. In their Lordships' opinion, they are excluded from considering the somewhat debatable question whether the present matter does fall within head (a) of section 52 (1), by the provisions of section 50 (3), as the contention of the respondents is that the Governor should have exercised his individual judgment. Nor is it necessary for their Lordships to consider whether "individual judgment" excludes the operation of section 49 (1). So far as it is relevant in the present case, their Lordships are unable to accept a suggestion by counsel for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of section 49 (1) and so far as the decision in the *Emperor* v. *Hemendra Prasad Ghosh*[1] decides that a minister is not such an officer their Lordships are unable to agree with it. While a minister may have duties to the Legislature, the provisions of section 51 as to the appointment, payment and dismissal of ministers and section 59 (3) and (4) of the Act of 1935, and the business rules made by virtue of section 59, place beyond doubt that the Home Minister is an officer subordinate to the Governor.

Their Lordships are therefore in agreement with the learned Chief Justice of the Federal Court that such matters as those which fell to be dealt with by the Governor under rule 26 could be dealt with by him in the normal manner in which the executive business of the Provincial Government was carried on under the provisions of Chapter II of Part III of the Act of 1935, and in particular, under the provisions of section 49 and the rules of business made under section 59.

There remains the criticisms of the manner in which the individual cases of detention have been dealt with. The six cases with which this appeal is concerned are the cases of respondents Nos. 1, 3, 5, 6, 7 and 8. In view of the opinions already expressed by their Lordships, the orders for detention in each of these cases must be taken as *ex facie* regular and proper, and it follows, as already stated, that there is a heavy burden on the respondents to displace the presumption enacted by section 16 (2) of the Defence of India Act. The respondents were enabled to raise the question as to whether the Governor was bound to give his personal consideration to the matter, by reason of the Crown's admission that he had not in fact

1. I.L.R. (1939) 2 Cal. 411 (S.B.).

done so in any of these cases. They were also able to raise a question as to the so-called routine order of 1st October, 1942, because of Mr. Porter's admission in his affidavit. The majority of the Federal Court held all the detention orders to be bad because of the first of these admissions, though they also deal with the routine order, and criticise adversely the whole procedure. The learned Chief Justice agreed with the majority as to the cases which were subject to the routine order; he disagreed as to the necessity for the personal satisfaction of the Governor, holding that the procedure authorised by section 49 was available to the Governor, but he held that the routine order vitiated the orders as to which it operated. One of these three cases—that of respondent No. 2, Bijoy Singh Nahar, is not before the Board, as he was released shortly after the judgment of the Federal Court. On the other hand, as regards the cases of the present respondents Nos. 3, 6, 7 and 8, he stated that he was unable to find in the evidence anything which established even a *prima facie* case that the orders under rule 26 had been improperly made or to contradict the accuracy of the narrative of the orders. Thereby he differed from the majority of the Court as regards these cases.

The evidence before the Federal Court consisted of affidavits by the respondents, the counter-affidavit by Mr. Porter, Additional Home Secretary to the Bengal Government and certain statements and answers regarding detention under rule 26 given by the Home Minister, Bengal, in the Bengal Legislative Assembly. In common with the Chief Justice of the Federal Court, their Lordships have been unable to find anything—apart from the routine order—in these statements and answers of the Home Minister which affords evidence of improper procedure in the individual cases before the Court, even assuming that such evidence was admissible, which, in the opinion of their Lordships, was at least open to doubt. It is the evidence of Mr. Porter that establishes the application of the routine order in some of these individual cases. Further, there is nothing in the affidavits filed by the respondents which establishes such a *prima facie* case, and they were not so founded on at the hearing before the Board. The respondents' case was founded on the statements and answers by the Home Minister, as to which their Lordships have expressed their view above, and Mr. Porter's counter affidavit, which their Lordships will now consider.

In paragraph 8 of his affidavit Mr. Porter states that on the 1st October, 1942, the Home Minister directed that, on receipt of the report of arrest under rule 129 of the Defence of India Rules together with a recommendation by the Police for detention under rule 26 in respect of persons arrested in connection with the disturbances or suspected of being so connected, orders of detention under rule 26 (1) (*b*) should at once be issued as a matter of course subject to review by Government on receipt of further details to be supplied in each case by the Intelligence Branch. That clearly meant the substitution of the recommendation by the Police in place of the satisfaction of the Governor prescribed by rule 26, and equally rendered any order under rule 26 in conformity with the Home Minister's direction, to which their Lordships have already referred as the routine order, *ab initio* void and invalid as not being in conformity with the requirements of rule 26. Their Lordships now turn to the cases before them, to which the routine order applied, and they quote the statement of Mr. Porter with regard to the first of these two cases, that of respondent No. 1.

"10 Sibnath Banerji. He was arrested by the Police under rule 129 of the Defence of India Rules on 20th October, 1942. On the 27th October, 1942, I considered the materials before me and in accordance with the general order of Government directed the issue of an order of detention under rule 26 (1) (*b*) of the Defence of India Rules. On receipt of fuller materials the case was later submitted for consideration of the Honourable Home Minister, Bengal, from whom no order directing withdrawal or modification of the order of detention was received."

Their Lordships are unable to read Mr. Porter's statement that he had considered the materials before him as involving anything more than that he had considered the report of the arrest and the recommendation of the Police to see if there was material sufficient to justify the issue of an order under the routine order.

It cannot mean that, in spite of the direction of the Home Minister in the routine order, he considered the materials before him so as to satisfy himself, independently of the police recommendation, that an order under rule 26 should be issued. That would not be in accordance with the requirement of the routine order that—the police having recommended it—the order of detention should be issued as a matter of course. Further, the inaction of the Home Minister on the later submission of the fuller material to him could not cure the invalidity of the order of the 27th October, 1942.

The case of Nanigopal Majumdar, respondent No. 5, is stated in paragraph 11 of Mr. Porter's affidavit and is substantially the same as that of respondent No. 1. The order in his case was issued by Mr. Porter on the 8th March, 1943, and no further materials had been received at the date of the affidavit, the 24th May, 1943.

Their Lordships agree with the unanimous conclusion of the Federal Court that the orders of detention in the cases of the present respondents Nos. 1 and 5 are invalid.

There remain the cases of respondents Nos. 3, 6, 7 and 8. The orders of detention in these cases were earlier in date than the routine order of the 1st October, 1942, and are not affected thereby. As their Lordships have already stated, there is no evidence in these cases sufficient to rebut the presumption as to their regularity. There is only one point on which their Lordships desire to add an observation. In paragraphs 2, 3 and 4 of his affidavit Mr. Porter states that in the cases of Debabrata Roy, present respondent No. 3, Pratul Chandra Ganguly, present respondent No. 8, and Birendra Ganguly present respondent No. 7, he himself considered the materials supplied and, in fact, the orders of detention were signed by him. In the case of Niharendu Dutt Majumdar, present respondent No. 6, Mr. Porter, in paragraph 6 of his affidavit, does not say by whom the case was considered. The order of detention is signed by S. B. Bapat, Deputy Secretary to the Government of Bengal. This is a case typical of the application of the presumption, and, if the respondents had wished to probe the matter, in case the consideration might have been by someone not qualified as an officer subordinate to the Governor within the terms of section 49 of the Act of 1935, they should not have let the matter rest there, but proceeded either by counter affidavit or by cross examination of Mr. Porter on his affidavit. As they did not take such a course, the presumption remains undisturbed.

Accordingly, their Lordships agree with the Chief Justice of the Federal Court that the orders of detention in the cases of respondents 3, 6, 7 and 8 were valid, and the appeal of the Crown will be allowed in the case of these four respondents. Counsel for the Crown stated to their Lordships that, without prejudice to any further action under rule 26 that the Crown may find it expedient or necessary to take, it was not intended that any further action should be taken against these four respondents under the particular orders which are before the Board in this appeal. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed as respects respondents No. 3, 6, 7 and 8, and the judgments and orders of the Courts below should be set aside, and that it should be declared that the order of detention under rule 26 of the Defence of India Rules in each of these cases was a valid and proper order; that in the case of respondents Nos. 1 and 5, the appeal should be dismissed and the judgments and orders of the Courts below should be affirmed. There will be no order as to costs.

Solicitors for the Crown: *Solicitor, India Office.*

Solicitors for the Respondents: *Stanley Johnson and Allen.*

V.S. ——— *Appeal allowed as against some respondents and dismissed as against the rest.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT AND MR. JUSTICE KUPPUSWAMI AYYAR.

Subramanian *alias* Seeni Chettiar, minor, by father and Guardian R. M. S. N. Narayanan Chettiar .. *Appellant**

v.

M. P. P. S. P. L. Muthiah Chettiar and another .. *Respondents.*

Hindu Law—Adoption—Adoption by widower—Validity and effect—Divesting—Right of adopted son to the stridhanam *properties of adoptive father's deceased wife which had reverted to her parents' family by custom among Nattukottai chettiars.*

An adoption by a Hindu widower is valid and the adoption will take effect as if the son had been adopted in the life time of the deceased wife of the adoptive father. The adopted son will divest all intermediate estates which had vested before his adoption subsequent to the death of the adoptive mother either by inheritance or by the application—as in the present case—of the custom of reverter to her parents' family of *stridhanam* property of a Nattukottai Chetti woman dying childless.

An alleged custom that the reverter would exclude a son adopted after the death of the woman was not established in the case.

Appeal against the decree of the Court of the Subordinate Judge of Devakottai in Original Suit No. 83 of 1942.

K. Rajah Aiyar and *M. S. Vaidyanatha Aiyar* for Appellant.

R. Gopalaswami Ayyangar for Respondents.

The Court delivered the following

JUDGMENTS : *Mockett, J.*—The Judgment of my learned brother which I have had the advantage of reading has so fully set out the facts and issues for determination in this case that I do not propose to repeat them. I am in complete concurrence with all his conclusions on the issues of fact and I propose to add nothing with regard to points 2 and 3 which relate to the question whether in the case of item 1 of schedule C the property concerned is that of the first plaintiff or of Deivanai and in the case of items 1 to 4 of schedule D whether the properties belong to Deivanai or to the joint family. With regard to the question of fact as to whether the adoption of Subramaniya by the first defendant has been proved, I consider that apart from the oral evidence the documents support the allegation that the adoption was carried out

[After reviewing the evidence on this question His Lordship proceeded]

With regard to the question of law involved, it is important, first to consider whether the learned Judge's conclusion relating to the custom alleged by the plaintiff is correct. That conclusion is to be found in paragraph 84 of the judgment and reads as follows :

"I find that the custom of reverter alleged by the plaintiffs in paragraph 21 is true and valid to the extent that presents and moneys proved to have been given by the members of the parental family and their relatives revert to the parental family and the presents and moneys given by the husband's family and their members revert to the husband's family."

But was that custom pleaded in paragraph 21 of the plaint? The effect of the authorities seems to be that a custom must be proved to be certain, reasonable, immemorial and without interruption and each of these circumstances should be alleged in the plaint. It is convenient to set out that part of paragraph 21 of the plaint which purports to plead the custom on which the plaintiffs rely. It is as follows :

"According to the custom of the Nattukottai Chettiar community to which the plaintiff and defendants 1 to 3 in particular, belong, the first plaintiff has become entitled at the moment of said Deivanai Achi's death to all the things left by her and referred to in schedules E and F as well as the properties mentioned in C and D schedules if for any reason they also can be said to have belonged to or have been left by her as her effects when she died and all other properties which may hereafter be established or proved to have been left by her by the right or the principle of reverter. According to the binding and immemorial custom of Nattukottai Chettiar community, if a Nattukottai Chettiar woman dies leaving behind her no child or children born to her *or any son adopted to her and her husband prior to her death* or any lineal descendant or descendants by any such child or children or adopted son,

---

* Appeal No. 319 of 1943. 17th November, 1944.

the stridhanam, seermurai and other siruvattu monies and properties of whatever nature they may be whether jewels, vessels, cloths, etc., presented or given to her either at the time of the marriage by her parents' family or relatives or on subsequent numerous occasions in accordance with the general usage, practice or custom of the community or acquired by her from her parents' house or other relations in any manner whatsoever except any property that might have been acquired or got directly from her husband's family and all accumulations descend and go to her father or the father's child or children adoptive or natural or his or their lineal descendants, if any, surviving her by right of reverter."

I omit the rest of the paragraph as it is more in the nature of an argument than in the nature of a pleading. The important allegation is that, according to the binding and immemorial custom of the Nattukottai Chettiar community, if a Nattukottai Chettiar woman dies leaving behind her no child or children born to her or any son adopted to her and her husband prior to her death or any lineal descendant or descendants by any such child or children or adopted son, the stridhanam and other properties given by her relatives or by per parents or it would seem by anyone at any time other than her husband's family descend and go to her father or his family. The only exception is property derived from her husband's family. I again stress the words " or any son adopted to her and her husband prior to her death " and especially the words " prior to " which of course raised the all important point in this case. The plea seeks to exhibit an important addition to the custom of descent of property among Nattukottai Chettiars as recognised by this Court and I do not consider that the evidence is such that the addition to the custom pleaded has been proved. In so far as the customs amongst this community have been accepted, two decisions of this High Court are in point. Madhavan Nair, J., (as he then was) delivering the judgment of the Bench held in *Official Assignee of Madras* v. *Muthayee Achi*[1], that the following custom had been proved by unimpeachable evidence :

" The amounts of the gifts are handed over to the senior male member of the bridegroom's family in the shape of hundies drawn in favour of the bridegroom by the senior male member of the bride's father's family for the amounts. They are so handed over to him for his making them accumulate by lending them out for interest. He invests them in the money-lending shop of his family if that family has one, and in some other shop if his family has none or if the shop of that family is not financially sound or if the bride's father's family so desires. Interest is allowed on them at the rate current in Rangoon adding it to the principal amounts and interest, is payable to the bride on demand during her lifetime and is taken by the children of the marriage if any are left when the bride dies and by her father's family otherwise."

Wallace AND Jackson, JJ., in *Palaniappa Chettiar* v. *Chockalingam Chetti*[2], stated as follows :

" It seems clear that there is a custom having the force of law by that, if the daughter of the family dies issueless, the stridhanam will revert to her parents, but there is at present no clear custom having the force of law by which such reverter occurs when the daughter has issue and dies leaving issue. There is no certain custom in such a case governing the destiny of the stridhanam, and that destiny is apparently being decided by mutual arrangement sometimes one way, sometimes another."

The learned Judges were concerned to consider this topic as it was contended before them that the stridhanam reverted to the parents even when the daughter had female issue and that female issue died without issue. I accept the position that these decisions establish the custom therein stated. But neither of these cases nor any of the others cited to us establishes that the reverter to the parents operates so as to exclude a son adopted after the daughter's death. The all important question, namely, whether a son adopted after the daughter's death is to be treated as being in the same position as a son adopted before her death is the very point which we have to decide now. The introduction of the words " prior to her death " in the pleading shows that the plaintiffs were fully conscious of the extent of the custom which it was incumbent on them to prove. The written statement of the second defendant explicitly denied the custom and pleaded that according to the custom obtaining among the Nattukottai Chetti community an adoption made to a deceased lady is perfectly valid and will vest all her properties in the adopted son even if they had vested already in others. This custom also has not been established by the appellants but that does not affect the decision in this case. The ultimate decision will rest on the law and not on custom.

1. (1937) M.W.N. 493. 2. (1929) 57 M.L.J. 817.

I am concerned with the question of law as I do not agree with the finding of the learned Judge relating to the plaintiff's alleged custom. With all respect to the learned Judge I consider that his finding in paragraph 84 does not deal with the very precise pleading in paragraph 21 of the plaint. There is no allusion to the position which arises in the case of an adoption after the daughter's death. I need not repeat in full the analysis by my learned brother of the evidence to prove the plaintiff's alleged custom.

Of the nine witnesses called, the learned trial Judge expressly states that he derived no assistance from the evidence of P. Ws. 2, 4, 6 and 7. I entirely agree that the very slender evidence which remains does not prove the custom alleged. Indeed, it hardly touches it, if at all. There was no evidence as to what was the custom on facts such as are now before us. In paragraph 41 of his judgment the learned Judge expressed the view that:

"On the question of the custom of devolution set up by the plaintiff there is no difficulty in holding on the evidence adduced, that the custom is that whatever has been given to the bride at the time of the marriage and thereafter by the members of the parental family and their relatives reverts to the parental family, and that whatever has been given by the husband's family and their relatives reverts to them."

But this does not decide the point as it disregards the words "adopted . . . prior to her death." I am unable to find in the record evidence proving the custom pleaded by the plaintiffs and accordingly must differ from the finding on this topic by the learned Judge. It is necessary therefore to approach the legal position on the basis that no custom has been proved which assists me in determining the point of Hindu Law involved which seems to me to be this: In the case of an adoption after the death of the adoptive father's wife, does the stridhanam and other properties acquired by the latter other than from her husband's family revert on her death to her father's family or descend to the adopted son. It follows too that it is necessary to decide whether property vested in members of her father's family becomes divested in the event of an adoption after her death by her husband, which is what happened in this case.

So far as the position of an adopted son in the family of the adopter is concerned, there is an authority of the Judicial Committee in *Padmakumari Debi Chowdhrani* v. *Court of Wards*[1]:

"An adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimamsa, the authorities that govern the decision of questions of adoption arising in the Bengal School. And no text has been produced to show that an adopted son cannot succeed to the estate of such relatives of his father as are sprung from a different family."

In the absence therefore of any special custom, which has been negatived in this case, the adopted son will have the same rights of inheritance, his existence as a son taking effect as at the time of his adoptive father's death. Mr. Ameer Ali delivering judgment in *Pratap Singh Shiv Singh* v. *Agarsinghji Rajasangji*[2] observed

"Now it is an explicit principle of the Hindu Law that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son."

In *Sankaralingam Pillai* v. *Veluchami Pillai*[3], Leach, C.J. delivering the judgment of the Full Bench summarised the arguments in favour of a right in the adopted son to demand his share in the family estate, notwithstanding that the other coparceners have already partitioned, and they are as follows:

"(i) It is a rule of Hindu Law that an adoption dates back to the date of the death of the father.

(ii) There is no reason why an adopted son should be placed in an inferior position to that of the posthumous son, the heir of a disqualified person and the absent coparcener.

(iii) The right of the adopted son to demand re-partition has been recognised in two cases; *Krishna* v. *Sami*[4] and *Baji Rao* v. *Ramakrishna*[5].

---

1. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302 at 311 (P.C.).
2. (1918) 36 M.L.J. 511: L.R. 46 I.A. 97: I.L.R. 43 Bom. 778, 792 (P.C.).
3. (1942) 2 M.L.J. 678: I.L.R. (1943) Mad. 309 (F.B.).
4. (1885) I.L.R. 9 Mad. 64 (F.B.).
5. I.L.R. (1941) Nag. 707.

(iv) There is support to be found for the proposition in Strange.

(v) As an adoption divests an estate of inheritance it would be unjust to deny to the adopted son the right of claiming a re-partition when the rule of survivorship applies."

Holding that an adopted son was entitled to re-open a partition made by the members of the family after the death of the coparcener but before the adoption, the Full Bench held that the adoption was the over-riding factor and restored the position so far as the partition was concerned, subject to lawful alienations in the meantime. That the adopted son is bound by such alienations appears to be the only limitation of his rights and all other properties which had come into the hands of those who took part in the partition reverted to the adopted son. The legal position of the adopted son is therefore established by the highest authority so far as his position *vis-a-vis* his adoptive father is concerned. It is, however, argued before us that the position is not the same *vis-a-vis* his mother, or to put it in another way, the wife of his adoptive father. In the case before us, no complication arises from the fact that Subramaniam had more than one wife. Deivanai who died on 28th August, 1938, was his sole wife. Subramaniam, the first defendant, adopted the second defendant, whose name is also Subramaniaya, on 7th of June, 1939, and it is argued that the second defendant although having a father never had a mother and therefore could not succeed to Deivanai's estate.

The decisions referred to above assist in solving this difficult question. The case of *Sundaramma* v. *Venkatasubba Ayyar, J.*[1] has a direct bearing upon it as the judgments contain important observations by Phillips, J. and Madhavan Nair, J. (as he then was) respectively which discuss the general position of a son adopted by the widower after his wife's death. Phillips, J., discussing the decision of the Privy Council in *Narasimha* v. *Parthasarathy*[2] took the view that if the son can be deemed to be the natural and legitimate son of his father, by the same fiction he would be the son of his father's wife also, and at page 951 Madhavan Nair, J., observed :

"To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a 'receiving mother' being discarded, I cannot find any difficulty in holding that the wife of the adoptive father though she was dead at the time of adoption can be considered as the adoptive mother."

There is therefore authority binding upon me which goes some way towards the solution of this case. It seems to me to amount clearly to this, namely, that an adopted son does become the son both of his adoptive father and his adoptive father's deceased wife. When dealing with fictions, I cannot see why decisions arising out of fiction should not be carried to their logical conclusion. In *Amarendra Mansingh* v. *Sanatan Singh*[3] which concerned the validity of an adoption, their Lordships at page 656 and 657 emphasised, after consideration of the case law, that it would not be possible to say that the sole test of the validity of an adoption is the vesting or divesting of property and at page 657 observed :

"It necessarily follows (their Lordships think) from this decision [*Pratap Shivsingh* v. *Agarsinghji Rajasangji*[4]] that the vesting of the property on the death of the last holder in someone other than the adopting widow, be it either another coparcener of the joint family or an outsider claiming by reverter, or, their Lordships would add, by inheritance cannot be in itself the test of the continuance or extinction of the power of adoption."

In the present case, there is no question of the power to adopt. It would seem that their Lordships took the view that material considerations should take second place to the spiritual considerations which are the basis of the Hindu Law of adoption. The latest decision of the Judicial Committee relating to divesting is *Anant* v. *Shankar.*[5] The following is the genealogical table in that case :

---

1. (1926) 51 M.L.J. 545 : I.L.R. 49 Mad. 941.
2. (1914) 26 M.L.J. 411 : L.R. 41 I.A. 51 : I.L.R. 37 Mad. 199 (P.C.).
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
4. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).
5. (1943) 2 M.L.J. 599 (P.C.).

Dhulappa.

Ponnappa, d. 1901. Hanumantappa.

Gundappa, d. 1902. Narayan, d. 1908. Ramachandra.

Bhikappa, d. 1905 : Ganga Bai. Shankar (Deft.). Hanamant. Babu.

Keshav, d. 1917. Anant, adopted 1930 (Plff.).

At the time of Keshav's death, his nearest heir was the defendant Shankar, a remote collateral, who obtained possession from the Collector in 1928. The adoption in 1930 of Anant by Ganga Bai resulted in a suit by Anant through Ganga Bai as his next friend. The plaintiff succeeded before the trial Judge and obtained a decree for possession and for a declaration that he was the lawfully adopted son of Bhikappa and as such the heir of Keshav. The High Court set aside the order for possession and mesne profits and qualified the declaration by adding the words, " except as regards the watan property which has already vested in the defendant." The High Court took the view that as the coparcenary had come to an end on the death of Keshav in 1917 and the family property had then vested in his heir, the subsequent adoption in 1930 though valid would not revive the coparcenary or divest Keshav's heir, the adopting widow not being herself Keshav's heir. Their Lordships allowed the appeal and in the course of the judgment observed as follows at page 675 :

" If the effect of an adoption by the mother of the last male owner is to take his estate out of the hands of a collateral of his more remote than a natural brother would have been and to constitute the adopted person the next heir of the last male owner, no distinction can in this respect be drawn between the property which had come to the last male owner from his father and any other property which he may have acquired. Keshav's separate watan property devolves not on his mother who would be his heir at the general law but on the nearest male in the line of heirs ; and if the plaintiff's adoption as son to Bhikappa puts him in that position, his right to succeed cannot be limited to such watan property as Keshav derived from Bhikappa. On this ground the appellant's suit succeeds as regards the two parcels of land which Keshav inherited from Narayan."

The whole subject of divesting is discussed by the learned editor of Mayne's Hindu Law, 1938 Edition, at pages 234 and 235. As already stated, the exact position before us now has not been the subject of judicial determination but from a consideration of the authorities, if it is correct to premise that the second defendant is the son of Deivanai for all purposes, I feel constrained to hold that by his adoption he was entitled to the properties of the deceased Deivanai and that any properties which vested in the plaintiff become divested. I would add my agreement with my learned brother's view that, with regard to the properties other than those which are clearly stridhanam in character, there is no evidence to show from what source Deivanai derived the funds. I am also in general agreement with the conclusions arrived at by my learned brother and the order proposed.

Kuppuswami Ayyar, J.—The appellant is the second defendant. The first respondent is the first plaintiff and the second respondent is the father of the appellant and the first defendant in the suit. The second plaintiff, the wife of the first plaintiff (first respondent) is not a party to this appeal, and her claim as set forth in the plaint was disallowed. She has not filed any appeal. The third defendant, the adoptive mother of the first plaintiff, is dead and no legal representatives have been brought on record as the first plaintiff claimed to be her heir. The names of defendants 4 to 13 who were some of the debtors in respect of the outstandings which were the subject-matter of the litigation were struck off on the ground that they were unnecessary parties and they have not been made parties to this appeal.

The subject-matter of the suit consisted of several items of moveable and immoveable properties and outstandings described in Schedules A to F of the plaint.

The suit so far as the items described in Schedules A, B and E of the plaint except item 6 of schedule B as also the suit in respect of items 5 to 8 of schedule F of the plaint has been dismissed. A decree was passed only in favour of the first plaintiff and that in respect of item 6 of Schedule B, items 1 to 4 (*a*) of F schedule and the items shown in schedules C and D. In the memorandum of appeal, it is specifically stated that item 2 in schedule C is not in dispute in this appeal. With regard to item 6 of schedule B, the decree was passed against the first defendant; he has not filed any appeal, nor has he filed any memorandum of cross-objections. Thus, the appeal relates only to item 1 of Schedule C, the four items in Schedule D and items 1 to 4 and 4 (*a*) of schedule F.

The first plaintiff was taken in adoption by the third defendant, the widow of the late Shanmugam Chetty *alias* Palianiappa Chetty on 27th May, 1936. The second plaintiff is his wife. Shanmugam Chetty died in October 1928, leaving behind him his widow Egammai Achi, the third defendant, and a daughter by name Deivanai Achi. The first defendant (the second respondent) married Deivanai more than thirty years prior to the suit. Shanmugam Chetty was blind of both eyes and the first defendant, the son-in-law, was helping him in writing the accounts, etc., and was generally in management. After his death, as Egammai was an illiterate woman, the first defendant, the husband of Deivanai, her only daughter, was practically managing the properties and investing the income at his will in the names of Deivanai and Egammai. After the first plaintiff was adopted by Egammai he and his wife lived in the family house for some time; but misunderstandings arose and when the plaintiffs were away, defendants 1 and 3 and Deivanai closed the front door of the house and locked it and removed all the valuables, account books, etc., to the house situated in item 1 of Schedule C which was behind the family house. Subsequently, Deivanai fell ill and died on 28th August, 1938 leaving no children. It is the plaintiff's case that on the death of Deivanai, all stridhanam properties given to her by her parents and their relations devolved, by a custom of reverter prevailing in the Nattukottai Chetty community to which they belonged, on the paternal family. The plaintiffs, therefore, claim that all the properties which are the subject-matter of litigation which stood in the name of Deivanai were either the properties of the first plaintiff's family or if they were the properties which had their nucleus in the gifts by the parents and their relations to Deivanai, they reverted to the family of the first plaintiff on Deivanai's death. The properties mentioned in schedules C, D, E and F which were claimed to be properties of Deivanai were settled on the second plaintiff by the first plaintiff under a document, dated the 6th June, 1939, Exhibit P-12, which has not been printed. The plaintiffs, therefore, prayed for a decree directing defendants 1 to 3 to render a true and proper account of the management of the properties of the first plaintiff's family and to furnish a true inventory of all the properties and other documents relating to the family and for recovery of such properties as may be found to be family properties and the properties described in schedules A and B of the plaint. There was also a prayer for a declaration that the properties mentioned in schedules C and D of the plaint were part of the family properties of the first plaintiff and for a decree for recovery of item 1 of schedule C and for an injunction restraining defendants 1 to 3 from obstructing the plaintiff in his possession and enjoyment of item 2 of schedule C. Schedule D consisted of four items of outstandings, and the prayer was for a declaration that they were the joint family properties of the first plaintiff and for an injunction restraining defendants 1 to 3 from realising or dealing with any of the outstandings or securities or shares referred to in schedule D of the plaint. With regard to the properties mentioned in schedules E and F of the plaint, the prayer was for a decree declaring that the properties and investments mentioned in Schedules E and F belonged to the first plaintiff as having been obtained by him by the communal custom of reverter on the death of Deivanai leaving no issues at the time of her death, and for directing the first and third defendants to render a true and proper account in respect of those items.

The third defendant, Egammai, supported the plaintiff's case but pleaded that she was entitled to the properties of Deivanai in preference to the first plaintiff and that the first plaintiff would be entitled to them only after her death. She denied having had any hand in the management, pleaded that it was the first defendant alone that was liable to account and denied her liability to account to the plaintiffs.

Defendants 1 and 2 pleaded that the second defendant was taken in adoption by the first defendant on 7th June 1939, in accordance with the wishes of Deivanai expressed on the eve of her death. The custom of reverter pleaded was denied and it was further pleaded that it was the second defendant who would be entitled to the properties of Deivanai on her death as her adopted son. Items 1 and 2 of schedule C, the four items of schedule D and items 1 to 4 (*a*) of schedule F were claimed as properties of Deivanai inherited by the second defendant as her adopted son. With regard to item 1 of schedule C their case was that the western portion of it was given by the third defendant to the first defendant in 1914 with the concurrence of Shanmugam Chetty ; that the building was put up on it by Shanmugam for the use of the first defendant the expenses of construction having been debited against him by Shanmugam in his account and that ever since then he had been in possession and enjoyment of it. The eastern portion of that item belonged to the first defendant, and he had enclosed it by a compound wall and put up a tiled shed on it. It was denied that any jewels were presented to Deivanai by her parents at the time of the marriage. The jewels made and purchased from out of the funds of the first defendant save those worn by her were all left with the mother Egammai Achi and the keys of the rooms which were all kept by the first defendant were with the plaintiffs and the third defendant.

The learned Judge found that the first defendant was not in management of the properties of the first plaintiff's family and that he was not bound to account. He also found that except item 6 of Schedule B which belonged to the first plaintiff and was handed over to the first defendant and which he was hence bound to return, the other items of schedules A and B were not in the possession of the first defendant. The two items in schedule C were found to belong to the joint family of the first plaintiff. With regard to the four items in schedule D, the finding was that they belonged to the late Deivanai and that on her death by the custom of reverter they devolved on the first plaintiff. He also found that the adoption of the second defendant by the first defendant as the adopted son of the late Deivanai was true and valid, but held that the adoption would not divest the first plaintiff of the estate of Deivanai and that therefore he, the first plaintiff, was entitled to the items shown in schedule D and to items 1 to 4 (*a*) of schedule F. It was found that the first defendant was not in possession of any of the items mentioned in schedule E of the plaint or of items 5 to 9 of schedule F. It was further held that items 1 to 4 and 4 (*a*) of schedule F were the properties of Deivanai and that the first plaintiff became entitled to them on her death. The learned Subordinate Judge found that the settlement deed in favour of the second plaintiff was not valid and that it would not operate as a bar to divesting Deivanai's estate by the second defendant if it be found that he will be entitled to divest the intermediate heir and obtain possession of her estate from him.

As already stated above, the second plaintiff has not filed any appeal, nor is she a party to this appeal. The finding of the learned Judge that item 1 of schedule C belongs to the joint family of the first plaintiff is disputed by the appellant. The first respondent disputes the findings of the learned Judge that D schedule properties belonged to Deivanai. The correctness of the finding about the truth and validity of the adoption of the appellant, the second defendant, is also disputed by the first respondent (the first plaintiff).

The main points for consideration in this appeal are :

(i) Whether the adoption of the appellant as the son of Deivanai is true and valid ;

(ii) whether item 1 of schedule C belonged to the first plaintiff or was it the property of Deivanai ;

(iii) whether items 1 to 4 of schedule D belonged to Deivanai or to the joint family of the first plaintiff;

(iv) whether the custom pleaded in paragraph 21 of the plaint is true and valid to any and what extent;

(v) whether the adoption of the appellant would divest the first plaintiff of the properties of Deivanai which vested in him on the death of Deivanai and vest them in the appellant; and

(vi) which of the properties described in schedules D and F of the plaint would vest in the first plaintiff on the death of Deivanai under the custom of reverter.

Point No. 1.—The learned Subordinate Judge has found that the adoption of the appellant by the second respondent on 7th June, 1939, is true and valid.

[His Lordship then discussed the evidence and proceeded.]

We therefore agree with the learned Subordinate Judge that the first defendant did take the second defendant in adoption on 7th June, 1939, and that there was the giving and taking by the natural parents and by the adoptive father respectively.

In *Sundaramma* v. *Venkatasubba Ayyar*,[1] it was held that an adopted son of a Hindu whose only wife had died before the adoption became the son of that wife so as to inherit as such to the relations of her father's family. In *Sounthara Pandian Ayyangar* v. *Periaveeru Thevan*,[2] a Full Bench of this Court approved the above decision and held that such an adopted son of a Hindu widower became the adopted son of his predeceased wife. It was averred that the first defendant had a Vaduga wife and a son by her, but this was not proved. The first defendant, at the time of the adoption, was a widower with no children and he had married only one wife, the late Deivanai Achi. The learned Judge was hence justified in finding that the second defendant was validly adopted by the first defendant on 7th June, 1939, and that by the adoption he, the second defendant, became the adopted son of the late Deivanai Achi as well.

[The discussion on points 2 and 3 are omitted here as unnecessary for the purposes of the report.]

Points 4 *to* 6.—The next question for consideration concerns the person on whom the properties that belonged to Deivanai devolved on her death. Under the rules of Hindu law, the property of a Hindu woman devolves on her death in the following order: (*i*) Unmarried daughter, (*ii*) Married daughter who is unprovided for, (*iii*) Married daughter who is provided for, (*iv*) daughter's daughter, (*v*) daughter's son, (*vi*) son, (*vii*) son's son. If there be none of these, her stridhanam would go to her husband if the marriage is in an approved form and after him to the husband's heirs in the order of their succession to him. If she was married in an unapproved form it would go to her mother, then to her father, then to the father's heirs and then to the husband's heirs in preference to the Crown. In this case, there is no evidence that Deivanai was married in an unapproved form. She had no children. There were only her husband, her mother, and her adopted brother surviving. But her husband after her death adopted a son who became by the adoption her adopted son as well, as found above. Consequently, her husband would be, according to the general rules of Hindu law, the heir entitled to the properties if there had been no adoption subsequently. In any view of the case under the general rules of Hindu law when her husband survived her, her adopted brother, the first plaintiff, would have no rights to her properties. But it was pleaded in the plaint that among the Nattukkottai Chettiars to which community Deivanai belonged, there is a custom known as "reverter" under which,

"If a Nattukkottai Chettiar woman dies leaving behind her no child or children born to her or any son adopted to her and her husband prior to her death or any lineal descendant or descendants by any such child or children or adopted son, the stridhanam, seermurai and other siruvattu monies and properties of whatever nature they may be whether jewels, vessels, cloths, etc., presented or given to her either at the time of the marriage by her parent's family or relatives or on subsequent numerous occasions in accordance with the general usage, practice or custom of the community or acquired by her from her parent's house or other relations in any manner whatsoever except any pro-

---

1. (1926) 51 M.L.J. 545 : I.L.R. 49 Mad. 941. (F.B.).
2. (1933) 65 M.L.J. 58 : I.L.R. 56 Mad. 759

perty that might have been acquired or got directly from her husband's family and all accumulations descend and go to her father or the father's child or children adoptive or natural or his or their lineal descendants, if any, surviving her by right of reverter."

It was pleaded on the strength of this custom that all the properties of Deivanai Achi except those that had been acquired or got directly from her husband's family devolved upon the first plaintiff, the only male member of her parents' family. The appellant and his father, the first defendant, denied that there was any such custom as pleaded in paragraph 21 of the plaint. On issue 9 which runs thus: "Whether the custom of 'reverter' alleged by the plaintiffs in paragraph 21 of the plaint is true and valid?" the learned Subordinate Judge gave the following finding in paragraph 84 of his judgment:

"I find that the custom of reverter alleged by the plaintiffs in paragraph 21 is true and valid to the extent that presents and moneys proved to have been given by the members of the parental family and their relatives revert to the parental family and the presents and moneys given by the husband's family and their members revert to the husband's family."

It is rather unfortunate that the learned Subordinate Judge has not found specifically whether this result will follow only in the circumstances stated in paragraph 21 of the plaint, *viz.*, if the deceased left no children or lineal descendants or no adopted son *adopted by her and her husband prior to her death.* He has not discussed the evidence with regard to this particular condition as to whether the custom of reverter would come into operation only if there had been no adopted son or descendants of any adopted son *adopted before the woman's death.* In short, the custom pleaded was that an adoption after her death could in no way affect the inheritance or reversion.

The matter is not covered by judicial decision and our attention is not drawn to any instance in which there has been any case of adoption of any son to a woman after her death by her husband whose claim to the properties of his adoptive mother had been denied or refused. . . .

[Then his Lordship discussed the evidence and proceeded.]

It cannot therefore be said that the plaintiff has proved there could be any scope for the application of this custom of reverter in cases where there has been an adoption to the woman after her death by her husband. In this view it will be unnecessary to go into the question if the custom as found by the learned Subordinate Judge had been validly established or not.

There is one circumstance which goes to disprove the custom pleaded by the plaintiff that there will be a reverter in the absence of an adopted son adopted in the lifetime of the deceased woman. According to D.W. 1, even in her lifetime shortly before her death the late Deivanai desired to adopt the appellant as her son and requested his father to give the boy in adoption and that the adoption took place only in pursuance of her wish. The learned Subordinate Judge has accepted this version of D.W. 1, and it is also in evidence that it was the appellant that performed the funeral ceremonies of Deivanai. The general trend of the evidence of the plaintiff's witnesses who were examined to prove the custom about the reverter was to the effect, that all disputes relating to the deceased's estate would be raised and settled usually before the removal of the corpse of the woman to the cremation ground and that the properties also will be handed over to the woman's paternal family before the completion of the funeral ceremonies. P.W. 2 in particular has given evidence on this point. If it was a fact that an adoption subsequent to the death of the woman would not vest the property of the woman in such subsequently adopted son, there could have been no difficulty for the first plaintiff to have obtained from the first defendant the properties of Deivanai which would devolve on the first plaintiff by the custom of reverter on her death without issues. There is no evidence to show that there was any talk or any attempt then to obtain the properties of Deivanai from the first defendant or Egammai Achi. It is the consciousness of the fact that the woman had already desired that the second defendant should be adopted and that he would be adopted and that on such adoption the

properties would go to him that would account for the first plaintiff not following the usual practice prevalent among Nattukkottai Chettiars of having this matter decided and settled even before the corpse was removed to the cremation ground and obtaining possession of the properties and documents before the termination of funeral ceremonies. This is a circumstance which goes to disprove the plaintiff's contention that a subsequently adopted son will not be entitled to succeed to the properties of his adoptive mother.

Even if the custom as found by the learned Subordinate Judge is true and valid, the first plaintiff can claim a right only to those properties proved by him to have been given by the parents. The custom as found by the learned Judge relates only to two sets of properties of a Nattukkottai Chetti woman, namely, those given by her parents and their relations and secondly those that are given by her husband and her relations. The first plaintiff cannot succeed to any of the properties which are the subject of this appeal under this custom without proving that they were either given to Deivanai by her parents or their relations or were subsequent accretions of such gifts. As pointed out above, it is only in respect of items 1 and 2 of schedule F that there is evidence to prove that they were stridhanam properties of Deivanai given to her by her parents. In respect of items 2 to 4-*a* of schedule F and in respect of items 3 and 4 of schedule D, there is no evidence to show as to how Deivanai was able to get the funds. With regard to items 1 and 2 of schedule D, if they are the properties of Deivanai, the evidence goes to show that the money came in respect of those outstandings from her mother Egammai.

It was contended for the plaintiffs that the adoption of the appellant by his father after the death of Deivanai would not divest the property which had devolved on or reverted to the first plaintiff by the custom of reverter referred to above, as this is a case of adoption to a woman after her death and hence the adoption need not be given effect to as if the adoption had taken place in the lifetime of Deivanai herself. In *Padmakumari Debi Chowdhrani* v. *Court of Wards*[1], their Lordships of the Judicial Committee pointed out that an adopted son occupies the same position in the family of the adopter as a natural-born son, except in a few instances, which are accurately defined both in the Dattaka Chandrika and Dattaka Mimamsa. This was followed by the Judicial Committee in *Kali Komul Mozumdar* v. *Uma Sunkar Moitra*[2]. In *Pratapsingh Shivsingh* v. *Agarsing Rajasangji*[3], His Lordship Mr. Ameer Ali who delivered the judgment of the Judicial Committee in that case observed at page 793 :

> "Now it is an accepted principle of the Hindu law that an adopted son becomes for all purposes the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son . . . . Again it is to be remembered that an adopted son is the continuator of his adoptive father's line exactly as an *aurasa* son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect ; whenever the adoption may be made there is no *hiatus* in the continuity of the line."

In that particular case, the dispute was as between an adopted son adopted after the death of the last owner and the person who claimed a right to the grantors' estate, when the grant of the property terminated on the death of the last male owner without any male issue and the property reverted back to the family of the original grantors. It was not a case of inheritance but a case of reverter, and it was held that a subsequent adoption would divest the original grantor and that the adoption must be considered to have been made in the lifetime of the adoptive father and that there will be a divestment. In *Sankaralingam* v. *Veluchami*[4] it was pointed out that it was a rule of Hindu law that the adoption dates back to the date of the death of the father, that there was no reason why an adopted son should be placed in an inferior position to that of the posthumous son, and that such an adoption would divest an estate of inheritance already vested. It is only by applying

---

1. (1881) L.R. 8 I.A. 229: I.L.R. 8 Cal. 302, 311 (P.C.).
2. (1883) L.R. 10 I.A. 138 : I.L.R. 10 Cal. 232, 237 (P.C.).
3. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778, 793 (P.C.).
4. (1942) 2 M.L.J. 678 : I.L.R. (1943) Mad. 309, 330 (F.B.).

while the respondent's contention is that the grant carried not only the melvaram but also the proprietary interest in the land itself, and in the latter case there is no question but that water cess cannot be claimed by the Government.

It is not in dispute that the villages were originally granted as a shrotriem inam to the respondent's great-grandfather Govinda Rao, as a reward for his services as Head Sarishtadar of the district. The grant itself could not be found, and indeed it seems that no formal cowle was ever issued. It appears that it had been the original intention of Government to grant the shrotriem for three lives, but as Govinda Rao died before any cowle was issued it was confirmed for two lives in favour of Govinda's son Krishna Rao, the respondent's grandfather. The evidence begins with a letter (Ex. I) from the Secretary of the Revenue Department to the Chief Secretary of Government dated 8th December, 1825, transmitting a list of the villages selected by Govinda as a shrotriem. The letter stated the aggregate survey value of the villages, not, it will be observed, the revenue derived therefrom, and concluded "the extent and value of these villages being moderate the Board beg leave to recommend that they be granted as a shrotriem on the usual conditions." The Secretary to the Government replied saying that the grant of the villages on shrotriem tenure was approved and asking for the preparation and submission of the requisite deed so that it might be executed. On 22nd December, 1825, the Secretary to the Board of Revenue wrote to the Principal Collector, Coimbatore, forwarding a copy of a draft of a cowle for jaghirs and asking him to prepare a cowle accordingly for the grant to Govinda Rao. Then, on 26th April, 1832, the Secretary of the Board of Revenue informed the Chief Secretary that shortly before the death of Govinda Rao and at his request he had put his adopted son and next heir, Krishna Rao, in possession of the villages, and stating that the Board believed that no cowle was issued to Govinda Rao but that it was to be gathered from the correspondence that the shrotriem was granted for three lives or to the grantee and his next two heirs. The next document in order of date consists of entries in the register of inam in one of the shrotriem villages dated 6th February, 1864. The general class to which the inam belongs is stated to be "shrotriem village"; it is set out that the shrotriem being granted by the British Government is to be confirmed and that the present holder is willing to commute his present tenure into freehold by paying quit-rent. Then it is stated that the assessment of all the villages comprised in the grant including the value of the waste land is Rs. 7,000 and states how the value is calculated. On 6th May, 1864, a title deed was granted to Krishna Rao by the Inam Commissioner. The deed is in these terms:

Coimbatore (Seal—Inam Commission—Madras).

No. 559. Title deed granted to Krishna Rao.

1. On behalf of the Governor-in-Council of Madras, I acknowledge your title to the shrotriem village of Maileripalaiyam and six other villages as per 4th side—taluk of Coimbatore, district of Coimbatore claimed to be of acres 8,680.98 (eight thousand six hundred and eighty) of dry land, and acres 12.89 of wet land and (one hundred and thirty) 130.99 acres of garden land besides poramboke.

2. This inam is subject to a jodi or quit-rent of Rs. 10 per annum, and is confirmed for two lives only, but it is not otherwise transferable; and on the expiration of the limited term above-mentioned it will lapse to the State.

3. On your agreeing to pay an annual quit-rent of Rs. 1,182 (one thousand one hundred and eighty-two) rupees, inclusive of the jodi already charged on the land as above stated, your inam tenure will be converted into freehold; in which case the land will be your own absolute property, to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit-rent.

4. If you should desire to commute the quit-rent for the payment of a sum of money, once for all, equal to (20) twenty years' purchase of the quit-rent, you will be at liberty to do so.

Coimbatore, (*Signed*)————,

6th May, 1864. *Inam Commissioner.*

Rs. 4,700-0-0¼ (Seal: Inam Commission—Madras).

(Seal: Governor-in-Council of Madras.)

Whereas you have agreed to convert your tenure into a freehold, on the terms offered by you in clause (3) three of this Deed, your Inam is hereby confirmed to you as Freehold in perpetuity, subject

only to the payment of the annual quit-rent therein mentioned, *viz.*, Rs. 1,182 (one thousand one hundred and eighty-two rupees).

Coimbatore, (*Signed*)————,

6th May, 1864. *Inam Commissioner.*

(Seal: Inam Commission, Madras.)

	Dry.	Garden.	Wet.	Assessment. Rs.	As.	P.
Maileripalaiyam	2,099.98	93.24	12.89	4,700	0	0
Nachipalaiyam..	1,141.91	3.10	....			
Karisamikaundanpalaiyam ..	960.17	5.20	....			
Palattarai	665.57	9.55	....			
Iambakaundanpalaiyam.. ..	587.85	19.88	....			
Vellimalapatnam	2,461.04	....	....			
Naikampalaiyam	7,644.6 (sic)	....	....			
Total ..	8,680.98	130.99 (sic)	12.89	4,700	0	0

Coimbatore, (*Signed*)————,

6th May, 1864. *Acting Inam Commissioner.*

The next document in order of date is Ex. D which is headed "Revenue Board's proceedings dated 13th October, 1887." How this document came into existence is somewhat obscure, but taken together with Ex. C, which is dated 29th May, 1913, the position seems to have been this. In 1887, the Government were desirous of acquiring some of the shrotriem lands. There was an award by the District Judge of a sum by way of purchase price for some of the lands which was paid on 29th March, 1884. With regard to 233 acres, the amount offered by the Government was refused and that land was accordingly not bought but was ordered to be kept as an enclosure within the reserve of the forest. But in 1912, the Jaghirdars themselves proposed an exchange of these 233 acres for other land in the neighbourhood and to this the Government agreed. The document Ex. D is a copy of the Inam claims register and the importance of it is that it shows that the Jaghirdars' claim to proprietary rights over the village was admitted to the extent of 1273 acres and to 233 acres portion of 210 bullahs, though to the remainder of the 210 bullahs title was not admitted. Then when the suggestion for an exchange of these 233 acres was made the Jaghirdars expressly claimed melvaram and proprietary rights over them and Ex. C shows that on 29th May, 1913, this claim was admitted and the exchange was effected, 240 acres being awarded to the claimants, as they were called, on the same tenure as the block surrendered.

These are all the documents put in evidence relating to the land in question and no oral evidence was given which threw any light on the nature of the original grant. Before the Subordinate Judge, however, the Government Pleader produced, apparently without objection, a document stated by him to be a copy or draft of a cowle in use about the time of the original grant; and which he asserted showed the conditions on which such grants were made. If there had been evidence that this grant had been made on the conditions appearing in this document there would be no doubt that the original grant was of the right to melvaram only and no proprietary interest in the land itself was given. But no evidence was given as to this draft. Had objection been made to its being looked at, at all in their Lordships' opinion the objection ought to have prevailed. In any case it could only have been looked at for what it was worth and it appears from the judgment of the District Judge that the plaintiff did object that no such deed was ever granted to his predecessor. In fact it is clear that no deed at all was ever executed at the time of the original grant. Both the learned Subordinate and the District Judges paid great attention to this draft and indeed really founded their judgments upon it holding that it showed what were "the usual conditions" referred to in the letter of 8th December, 1825. But in their Lordships' opinion the document has no evidential value whatever. Assuming as they do that it was a genuine document obtained from a Government office, there is nothing to show that the conditions set out in it were, if usual, the only conditions which were usual or used, and certainly nothing

these principles of law it was held in that case that subsequently adopted son could ask for a re-opening of a partition effected in the jiont family before he was adopted. In *Anant* v. *Shankar*[1], which is the latest case on the point, the Judicial Committee, following the decision in *Amarendra Mansingh* v. *Sanatan Singh*[2] held that a subsequent adoption would vest the property in the adopted son displacing any title based merely on inheritance from the last surviving co-parcener. In that case, on the death of Keshab, the only son, of the adoptive father of the plaintiff who was adopted subsequently by the mother of Keshab after his father's death under a power given by Keshab's father, not only the coparcenary property of which he was the sole surviving owner but also property inherited by him from his uncle Narayan devolved on one Shanker the defendant in the suit, a collateral cousin of Keshab. After the adoption of Anant, the plaintiff, he filed the suit not only in respect of the coparcenary property of which Keshab was the sole and surviving owner but in respect of the property inherited by him from Narayan, his uncle. It was held that in respect of both kinds of properties there was a divestment of the estate which vested in Shanker on Keshab's death and that both properties on adoption vested in the plaintiff. It was also pointed out that the decisions in *Bhooban Moyee's case*[3], as interpreted in *Faizuddin Ali Khan* v. *Tincowri Sahai*[4] was no longer good law after the decision of the Privy Council in *Amarendra's case*[2]. The only limitation to this divesting is in respect of properties already alienated before the adoption, as was pointed out in *Veeranna* v. *Sayamma*[5]. *Vide* also the following observations at the bottom of page 124 in *Sankaralingam Pillai* v. *Veluchami Pillai*[6] made by Venkataramana Rao, J., after referring to the decisions in *Sri Virada Pratapa Raghunatha Deo* v. *Sri Broso Kishore Patta Deo*[7], *Veeranna* v. *Sayamma*[5], and *Bamundoss Mookerjee* v. *Mussamut Tarinee*[8].

> "The principle deducible from these decisions is that though the title of the adopted son dates back to the death of the adoptive father for inheriting or taking his adoptive father's estate, he takes the estate subject to the dispositions made within the competency of the person who was entitled to hold the said estate until his adoption."

In this case, though the adoption to Deivanai of the appellant was subsequent to her death it would take effect as if he had been adopted in the lifetime of Deivanai herself. As already stated above, there is no evidence to prove the custom alleged in the plaint that unless the adoption takes place in the lifetime of a Nattukottai Chetti woman the property will vest in the parents' family according to the custom. Under Hindu Law, the adopted son is in the same position as a natural son and unless there be any custom varying this rule of Hindu law—and in this case there is no evidence of any such custom—the adopted son will be entitled to divest the estate which had already vested in any intermediate holder. In *Pratap Singh* v. *Shivsingh Agarsingji Rajasingji*[9] his Lordship Mr. Ameer Ali, J., made the following observations :

> "Now it is to be observed that when a hereditary grant of the nature in dispute is made by a Hindu subject to the limitation that it shall be descendible in the direct male line, or, in other words, that it shall enure so long as the gratntees' male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. The limitation itself is a variation of the Hindu law; where a further custom is alleged confining the line to natural born issue alone, it must be proved affirmatively and conclusively, and not derived from implications."

It is contended that the fiction that the adoption should be considered to have taken place in the lifetime of the adoptive father should be confined to only adoptions by a Hindu widow after her husband's death and not to cases of adoption by a widower so as to make the adopted son the son of his deceased wife. It is true that there are no authorities on this point. But then that is no reason why this distinction should be made. Adoption itself is a fiction, and fictions play a large part in the

1. (1943) 2 M.L.J. 599 (P.C.).
2. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Patna 642 (P.C.)
3. (1865) 10 M.I.A. 279.
4. (1895) I.L.R. 22 Cal. 565.
5. (1928) I.L.R. 52 Mad. 398.
6. (1942) 1 M.L.J. 119.
7. (1876) L.R. 3 I.A. 154 : I.L.R. 1 Mad. 69 (P.C.).
8. (1858) 7 M.I.A. 169.
9. (1918) 36 M.L.J. 511 : L.R. 46 I.A. 97 : I.L.R. 43 Bom. 778 (P.C.).

law of adoption. In *Sundaramma* v. *Venkatasubba Ayyar*[1], Phillips, J., made the following observation :

"Wherever possible, therefore, a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption."

Madhavan Nair, J., as he then was, in the same case observed at page 951 :

"As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter, he must be considered to be the heir to any rights arising after the adoption from his father's wife's position in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child."

The learned Subordinate Judge has relied on the ruling of this Court in *Govindaraja Pillai* v. *Mangalam Pillai*[2]. It has no application to the facts of this case. There, a grant had to be construed. The intention of the person who executed the document had to be gathered and in construing in the document the words, "if there is no issue, after your death, your brothers should take the properties," were construed as excluding a later adopted son. That decision has therefore no application to the facts of this case.

Applying the principles of the above cited ruling, it has to be held that the adoption of the second defendant by the first defendant, must be given effect to as if the appellant was taken in adoption in the lifetime of Deivanai, and that he will divest all intermediate estates which had vested before his adoption subsequent to the death of Deivanai either by inheritance or by the application of the custom of reverter.

It is urged however for the first respondent that in this case since there has been an alienation of C to F schedule properties in favour of the second plaintiff, there could be no divestment. There will be some force in this argument if the second plaintiff had filed an appeal. She, the second plaintiff, the person in whose favour the settlement deed was executed by the first plaintiff, has not cared to file an appeal. So far as she is concerned, she cannot be granted any relief in this appeal. The learned Judge found that Exhibit P-14 did not evidence a *bona fide* alienation but was only a document got up to defeat the rights of the second defendant, and the learned Judge was of the opinion that if it was a *bona fide* alienation it might be a good answer in the event of the second defendant being found entitled to divest the estate of Deivanai. He further stated :

"But taking the circumstances under which it was executed, I cannot hold that the settlement deed even if true is valid so as to operate as a bar to divesting Deivanai's estate by the second defendant in the event of its being found that he is entitled to divest her estate and obtain possession of her properties from the heirs."

The alienation in *Veeranna* v. *Sayamma*[3] was also a gift and not an alienation for consideration. Whatever it be, that would not justify a decree in favour of the first plaintiff in respect of these properties, the lower Court having granted no relief to the second plaintiff in the suit. If the second defendant had been the plaintiff, and he had to sue for the establishment of his right in the properties, it would be different. The question now in this appeal is whether the learned Judge having found that the second plaintiff could not claim any rights as against the second defendant and others, was justified in finding that the first plaintiff had a valid title to the properties and giving a declaratory decree in his favour. It is therefore not necessary for us to go into this question as to how far the second plaintiff will be entitled to a decree.

As already found above, it is only in respect of items 1 and 2 of schedule F there is evidence to show that they represent the properties given by the parents of Deivanai to her at the time of the marriage. That both were stridhanam in the stricter sense in which it is used is not disputed. But in respect of the other properties which have been found by us to belong to Deivanai, there is no evidence to show from whom Deivanai got the funds for making those investments, except in respect

1. (1926) 51 M.L.J. 545 : I.L.R. 49 Mad. 941 at 944.
2. (1932) 63 M.L.J. 911.
3. (1928) I.L.R. 52 Mad. 398.

of items 1 and 2 of schedule D which we have found to be properties of Egammai. It is therefore not necessary to give any finding in this case as regards the class of properties to which the custom of reverter would apply, whether it would apply to seermurai, siruvattu and other properties as well. The evidence on this point is not only meagre but vague. Though a number of instances were given, there is no evidence as to what the nature of the properties concerned in those instances were, whether any of them can be said to be seermurai or siruvattu properties. Further, the only two cases relied upon to show recognition of this custom are *Official Assignee of Madras* v. *Muthayee Achi*[1] and *Palaniappa Chettiar* v. *Chockalingam Chetti*[2]. In the former case, the only question for consideration was whether there was a trust in respect of stridhanam given to a Nattukottai Chetti woman which were invested in the name of her husband. It is true that there are observations therein to show that the trust was for the benefit of the woman and her issues. The question was not who were all the beneficiaries of the trust but whether there was a trust or not, and that case therefore has no bearing on the facts of this case. In the latter case, there is a reference to the custom, and the custom was said to exist only in the case of stridhanam properties presented to a girl by her parents at the time of her marriage. This Court was not prepared to extend that custom to other cases in the absence of sufficient evidence. In the case before us, there can be no doubt that in the absence of any issues or lineal descendants of a Nattukottai Chetty woman, her stridhanam, namely, presents made to her at the time of her marriage by her parents revert back on her death without any children or lineal descendants to the parents of the family. But I do not think that the evidence would justify the extension of this custom to other kinds of property, and further it is not necessary to give a finding on that point in view of our findings as to how and with what funds the properties which are the sub-ject matter of the appeal were acquired by Deivanai.

So far as items 1 and 2 of D schedule are concerned, they have been found to be the properties of Egammai. The plaint is based on the allegation that they were either the properties of Shanmugam or Deivanai. It is only on that basis that the first plaintiff has claimed them. But if they did not belong to Shanmugam or to Deivanai, the suit in respect of the same must necessarily fail. It is true that Egammai died subsequent to the suit and the first respondent is her adopted son. The learned Counsel for the first respondent stated that the appeal on this ground should be dismissed as regards items 1 and 2 of schedule D. But then the parties have not gone to trial on the basis that they are Egammai's properties. The cause of action for the same arose after the filing of the suit. and it is not for us to speculate about the pleas likely to be raised by the parties in respect of a claim based as heir of Egammai. It will not therefore be open to this Court to consider that question in this appeal.

In the result, the appeal has to be allowed only in respect of D schedule properties and items 1 to 4 and 4-a of F schedule and the suit in respect of them dismissed.

The appellant and the first respondent will receive and pay proportionate costs in both the Courts.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL.

Gudivada Satyarao .. *Appellant**

v.

Vemparala Venkataratnam .. *Respondent.*

Civil Procedure Code (V of 1908), Order 41, rule 27 (1) (b) and (2) (Madras)—Admission of documentary evidence in the appellate Court—Reasons of the nature described in sub-rule (1) (b) of rule 27 of Order 41 set out in the affidavit accepted by the appellate Judge—Discretion in admitting the documents, whether exercised judicially.

---

1. (193[illegible]) M.W.N. 493. 2. (1929) 57 M.L.J. 817.

* S. A. No. 1202 of 1944. 9th August, 1945.

Where fresh documentary evidence was admitted by an appellate Court which accepted the reasons set out in the affidavit of the applicant asking for their admission for his inability to adduce such evidence in the trial Court and those reasons were of the nature described in sub-rule (1) (*b*) of rule 27 of Order 41, Civil Procedure Code,

Held, that in the circumstances it could not be said that the Judge of the appellate Court did not exercise his discretion judicially.

Narasimhamurthi v. *Hayat Khan*, (1940) 2 M.L.J. 287, distinguished.

Appeal against the decree of the District Court, Vizagapatam, in A. S. No. 615 of 1943 preferred against the decree of the Court of the District Munsiff, Vizagapatam, in O. S. No. 331 of 1939.

Kasturi Seshagiri Rao for Appellant.

K. Suryanarayana for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question whether the plaintiff has a right to the use of a lane in order that his scavenger may pass through it and empty a *kuppam* of its night soil and also whether the drainage water from the plaintiff's latrine might pass across the lane to the Municipal channel on the other side. The District Munsiff held that the plaintiff had proved that he had such a right and so granted an injunction restraining the defendant from interfering with the exercise of the plaintiff's right. The lower appellate Court came to a contrary conclusion and dismissed the suit.

The trial Court decided the issue whether the lane marked A1, B, C, D1 shown in the plaint plan were the common lane of the parties to the suit almost entirely on evidence of user. It did not separately consider the question whether the lane in dispute belongs to the defendant—as the defendant claims—or whether it belongs to the plaintiff and the defendant in common. The learned District Judge considered two questions in connection with this issue. The first was whether the lane belonged to the defendant or whether both the plaintiff and the defendant had title to it. Having come to the conclusion that the lane was the property of the defendant, he proceeded to consider whether the plaintiff had established a right by easement to the use of that lane. That, of course, was the proper way to approach this issue. The plaintiff could not have complained if the learned District Judge had not considered the question of easement; because the suit was based on the common title of the plaintiff with the defendant to the lane.

With regard to the discussion of the lower appellate Court of the question of title, the plaintiff in second appeal complains that the learned Judge admitted in evidence documents which he was not entitled to admit under Order XLI, rule 27 of the Code of Civil Procedure. The learned Judge undoubtedly applied the recent rule 27 (1) (*b*) and seems to have been satisfied that the defendant could not produce the evidence at the trial notwithstanding the exercise of due diligence. Under sub-rule (2) the appellate Court is bound to give its reasons. The reasons given by the learned District Judge are not very satisfactory. He said :

"These documents were not filed in the lower Court, for the reasons set out in the affidavit. In my opinion the admission of these documents is essential in the interests of justice."

He was not concerned with the question whether the interests of justice required the admission of the documents, but whether the defendant was unable to adduce such evidence in the trial Court notwithstanding the exercise of due diligence. It would however seem from the first sentence of the passage set out above that he did accept the statement of the defendant setting out the reasons for his inability to adduce evidence in the trial Court. The reasons set out in the affidavit were of the nature described in rule 27 (1) (*b*). I cannot say that the learned District Judge did not exercise his discretion judicially. In *Narasimhamurti* v. *Hayat Khan*[1], this Court ordered the appellate Court to reconsider the appeal, holding that he had wrongly admitted additional evidence ; but at that time Order XLI, rule 27,

1. (1940) 2 M.L.J. 287.

did not contain a clause similar to that found in sub-rule (1-*b*), and the learned Judges were concerned only with the question whether there was a lacuna in the evidence which the Court felt that it was bound to file.

If the additional documents were not wrongly admitted, then there was overwhelming evidence that the lane in question belongs to the defendant. The further question whether the plaintiff had proved an easementary right is one of fact, which has been dealt with in detail by the lower appellate Court.

The appeal is dismissed with costs.

K.C. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Samanthan Karakkattitathil Chandukutti Nambiar and another .. *Appellants**

v.

Ammad Kutti's son Kather Kutty Karnavan and Manager and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), section 51 (2)—Applicability—Rent payable in kind under a marupat—Commutation rate.

When rent is payable in kind under a *marupat*, section 51 of the Malabar Tenancy Act has no application. *Kunhi Raman* v. *Kunhi Raman*, (1945) 1 M.L.J. 336 and *Parameswara Nambudripad* v. *Subramania Iyer*, (1944) 2 M.L.J. 84, approved.

Accordingly, the plaintiffs in a suit for such rent are entitled to convert the rent at the market price prevailing as on the date of the suit. The commutation rate cannot be fixed with reference to the terms of section 51 (2) of the Malabar Tenancy Act.

Appeal against the decree of the District Court of North Malabar, in A. S. No. 219 of 1943, dated the 13th October, 1943, preferred against the decree of the Court of the Subordinate Judge of Tellicherry, in O. S. No. 46 of 1942, dated 8th March, 1943.

P. Govinda Menon for Appellants.

K. Parameswara Menon (Court Guardian) for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellants filed a suit for rent due under a registered *marupat*, dated 7th December, 1928, to the plaintiffs as representing the jenmi's interest. It is common ground that the documents under which the land was held provides for payment of rent in kind. The only question argued in appeal is whether the Courts below were right in fixing the commutation rate with reference to the terms of section 51 (2) of the Malabar Tenancy Act or whether plaintiffs are entitled to the market price of the produce as on the date of the plaint. Section 51 (2) runs as follows :

"Where any rent, michavaram or renewal fee payable under this Act is paid or is to be paid in money, in whole or in part, paddy, cocoanuts, arecanuts and pepper shall be valued, for the purpose of determining the sum due, at the average market price of the previous five years as published under sub-section (1)."

The contention of the appellants is that this is not a case in which rent payable under the Act is paid or is to be paid in money, but that if the rent can be deemed to be payable under the Act it is payable wholly in kind. There is a decision of Horwill, J., in *Karingampilly Manakkal Parameswaran Nambudiripad's son Parameswaran Nambudiripad alias Narayan Tharathar Nambudiripad* v. *Subramania Iyer and others*[1], to the effect that section 51 (2) does not apply to cases where it is necessary to estimate damages for breach of contract and that it cannot be applied where the rent is payable in kind. We are not now concerned with the correctness of the first portion of this observation but it is contended that when the rent is payable in kind, section 51 has no application. It has been so held in a number of deci-

* S. A. No. 485 of 1944. 11th July, 1945.

1. (1944) 2 M.L.J. 84.

sions of single Judges, one of which is *P. P. V. Kunhi Raman* v. *K. T. V. Kunhi Raman*[1]. While it might be plausibly argued that this view of section 51 (2) robs that provision of much of its effectiveness, it is a view which is at any rate arguable. It has been accepted by a number of learned Judges of this Court and it has in fact been embodied in the Amendment Act, Madras Act VI of 1945, which to a large extent deprives the question of its general interest.

In these circumstances, we do not see sufficient reason to differ from the line of decisions, and we hold that the plaintiffs were entitled to convert the rent at the market price prevailing as on the date of the suit. The appeal is, therefore, allowed with costs and the plaintiff will have a decree as prayed for.

K.S. — *Appeal allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD ROCHE, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Secretary of State .. *Appellant**

v.

G. Krishna Rao .. *Respondent.*

Inam—Grant of shrotriem inam—Nature of—Its character, if could be changed by title deed granted by the Inam Commission subsequently—Evidentiary value of entry in the Inam Register—Confirmation of grant for a period of lives only—Grant, if cannot be of full proprietary rights—Inclusion of poromboke in the inam—Effect—Civil Procedure Code (V of 1908), section 100—Question of law.

A grant of shrotriem inam may be of either the revenue from the land only, the melvaram, or it may be of the proprietary rights, that is of the rights which the Government had in the land. If the original grant gave only the melvaram the subsequent proceedings of the inam commission and the title granted by them will not change its character or vest in the inamdar a subject-matter not belonging to him. Where no sanad or cowle has been produced, the title granted by the inam commission and the entries in the inam register are evidence, and indeed the best evidence of the true character of the grant. In many cases the inam right does comprise the proprietary rights in the soil. There is no reason why the grant of full proprietary rights should not be made either for a period of lives or without any limitation in point of time and therefore, from the mere fact that a grant was expressly confirmed for two lives only it could not be said that it was of melvaram only.

In the circumstances and in view of the proceedings of the Board and of the inclusion of poromboke in the grant, the grant in question was held to be of the proprietary interest in the land itself.

A grant of the proprietary interest includes the grantor's right in tank, river and channel poromboke.

Questions which involve the decision as to the nature of a party's title and as to whether a document upon which both the lower Courts largely based their judgments constituted the conditions on which the original grant to that party was made, involve questions of law.

J. Millard Tucker and *S. P. Khambatta* for Appellant.

C. S. Rewcastle and *P. V. Subba Rao* for Respondent.

Their Lordships' Judgment was delivered by

LORD GODDARD.—The action out of which this appeal arises was brought by the respondent in the Court of the Subordinate Judge, Coimbatore, for an injunction restraining the Government of the Province of Madras from levying water cess from the plaintiff or his ryots in respect of a jaghir consisting of seven shrotriem villages in the Coimbatore taluk. The learned Subordinate Judge dismissed the action, and his judgment was affirmed by the learned District Judge of Coimbatore. His judgment was reversed by the High Court of Madras, which granted the injunction on 28th July, 194[illegible], and against that judgment this appeal is brought. In this judgment, which was delivered by Somayya, J., with whom Abdur Rahman, J., concurred, the High Court said that the only question they had to decide was whether under the grant in question all the rights which the Government possessed (that is all the rights in the lands in question) had passed to the grantee and with this their Lordships agree. The appellant contends that all that was granted to the plaintiff's ancestor was the melvaram, or right to the revenue, from the lands,

1. (1945) 1 M.L.J. 336.

* P. C. Appeal No. 41 of 1944. 26th June, 1945.

to show that they applied generally or that no other forms were used. Indeed, as will appear later in this judgment, it is now established that shrotriem grants sometimes carried only rights of melvaram and sometimes proprietary rights so that there must have been other forms and their Lordships agree with the High Court that this draft affords no evidence as to the terms on which the original grant was made and no conclusion or inference can be founded on or drawn from it.

Before turning to the main question in the case, it will be convenient to dispose of one matter raised by the appellant, namely, whether the appeal to the High Court was competent. It was argued that the whole question was one of fact and that as there had been concurrent findings by both the lower Courts a second appeal was incompetent by reason of the provisions of sections 100 and 101, Civil Procedure Code. No submission to this effect was made in the High Court and in their Lordships' opinion there is no subtance in the objection. What has to be decided is the nature of the respondent's title, which in their opinion involves a question of law. There is also the question as to whether the draft cowle upon which, as already observed, both the lower Courts largely based their judgments constituted any evidence of the conditions on which the original grant was made, and that again is a matter of law. Their Lordships have no doubt that the High Court had jurisdiction to entertain the appeal.

Turning now to the main questions, which are, what was the nature of the original grant and, what did it include, there are two matters which have been established by decision of this Board, which must be borne in mind. The first is that a grant of a shrotriem inam may be either of the revenue from the land only, which is termed melvaram, or it may be of the proprietary rights, that is of the rights which the Government had in the land. The second is that if the original grant gave only the melvaram the subsequent proceedings of the inam commission and the title deed granted by them will not change its character or vest in the inamdar a subject-matter not belonging to him. (*Secretary of State* v. *Srinivasachariar*[1] and *Secretary of State* v. *Vidhya Sri Varada Thirtha Swamigal*[2] hereinafter referred to as the *Swamigal case*).

In the present case as no sanad or cowle has been produced or even shown to have been executed the title deed granted by the inam commission and the extracts from the inam register referred to above are evidence, and indeed the best evidence of the true character of the grant. In the judgment of this Board, delivered by Sir George Rankin, in the *Swamigal case*[2] it was said that the Madras Act VIII of 1869, created no presumption that the view of the inam commission was unfounded and unquestionably in many cases the inam right does comprise the proprietary rights in the soil. In that case the Board held that the title deed granted by the commission and the entries in the register were evidence of the true intent and effect of the original grant and of the right which in 1864 was being recognised and continued. It was contended by the appellant in the present case that, as in this case the grant was expressly confirmed for two lives only, the two cases are essentially different, there being no limitation for lives in the former. In their Lordships' opinion this makes no difference, as they can see no reason why a grant of the full proprietary rights should not be made either for a period of lives or without any limitation in point of time. As the inam deed shows, if granted for lives, the grantee is given the option of acquiring an unlimited interest in the subject of the grant and that was done in this case. The proceedings in 1883 and 1884 and as recently as 1913 also show that at those dates the Government recognised that the full proprietary rights were vested in the grantee, and this case is stronger in favour of the grantee than was the *Swamigal case*,[2] not only on this ground but also because here the inam deed included poramboke in the grant. Since the decision of this Board in what is usually called the *Urlam case*,[3] there can no longer be any question but

1. (1920) 40 M.L.J. 262 : L. R. 48 I.A. 56 : I.L.R. (1942) Mad. 893 (P.C.). I.L.R. 44 Mad. 421 (P.C.).
2. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. 40 Mad. 886 (P.C.).
3. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166 :

that a grant of the proprietary interest includes the grantor's rights in tank, river and channel poramboke, and it is unnecessary to consider what effect, if any, such a grant has on what is called communal poramboke such as burning grounds, threshing floors and the like. In their Lordships' opinion the judgment of the Madras High Court in *Narayanaswami Naidu* v. *Secretary of State*[1] where a contrary opinion was expressed must be regarded as overruled to that extent by the *Urlam case*[2]. In the present case the High Court said :

"There is not the slightest indication that any rights were reserved by Government except the right to collect Rs. 1,182 every year. Further the expression 'besides poramboke' was put in to indicate that not merely the lands that were then cultivated as dry, wet, or garden were granted but also all the other rights which the grantor had as is pointed out by the Judicial Committee in the *Swamigal case*[3]."

With this their Lordships agree as they do with the rest of the High Court's judgment. There remain two further matters which should be mentioned. An argument was addressed to the Board which was not raised before the High Court based on the provisos to section 1 of Madras Act VII of 1865. By the first proviso a zamindar, inamdar, or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge and no cess shall be imposed for water supplied to the extent of this right and no more. It was submitted that this proviso did not apply because the lands were held under ryotwari settlement. If they were it would have been open to the Government to prove it, but no evidence whatever was given on this point and no more need be said upon it. The other matter is that their Lordships desire to emphasise, as did the High Court in their judgment, that this case is not concerned with the rights of persons other than the grantor and grantee, and the respective rights and liabilities between the inamdar and the ryots are in no way affected by this judgment. Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellant : *Solicitor, India Office.*

Solicitors for Respondent : *Douglas Grant and Dold.*

V.S. — *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Bombay.)

PRESENT :—LORD THANKERTON, LORD PORTER AND SIR MADHAVAN NAIR.

Ali Mahomed Adamalli .. *Appellant**

v.

Emperor .. *Respondent.*

Contempt of Court—Committal—Discretion of Court—Interference by the Privy Council—Existence of other remedy—Court, if cannot commit for contempt—Contempt of Courts Act (XII of 1926), section 2 (3)—Failure to obey order of Chief Judge of Small Cause Court to furnish information required by section 3 of the Mussalman Wakf Act (1923)—High Court not prohibited from taking action for contempt.

The question of committal or non-committal for contempt is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships of the Privy Council would be slow to interfere with that discretion.

The contention that a Court cannot commit for contempt if any other remedy exists is novel and unsupported by any authority. No doubt the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance.

Failure to obey an order of the Chief Judge of the Court of Small Causes at Bombay to furnish information as required by section 3 of the Mussalman Wakf Act, though is an offence under the provisions of that Act, is not an offence punishable under the Penal Code. Consequently, the High Court is not prohibited from taking action in respect of it by the terms of section 2 (3) of the Contempt of Courts Act.

1. (1912) 24 M.L.J. 36.
2. (1917) 33 M.L.J. 144 : L.R. 44 I.A. 166: I.L.R. 40 Mad. 886 (P.C.).
3. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).

* P. C. Appeal No. 4 of 1944. 3rd July, 1945.

C. S. Rewcastle and *S. P. Khambatta* for Appellant.

J. Millard Tucker and *R. K. Handoo* for the Crown.

Their Lordships' Judgment was delivered by

LORD PORTER.—This is an appeal by special leave from a judgment of the High Court of Bombay, dated 2nd December, 1941, by which the appellant was fined Rs. 1,000 for contempt under the Contempt of Courts Act (XII of 1926) in failing to obey an order made by the Acting Chief Judge of the Court of Small Causes at Bombay on 4th September, 1939. The order had directed the appellant to furnish a statement of particulars of wakf property under section 3, Mussalman Wakf Act, 1923 (Act XLII of 1923) as amended by the Mussalman Wakf (Bombay Amendment), Act 1935 (Bombay Act XVIII of 1935).

Under that section it is provided that every mutawalli shall furnish to the Court within the local limits of whose jurisdiction the property of which he is mutawalli is situated a statement containing certain particulars.

By section 5 every mutawalli is ordered to prepare and furnish to the Court to which such statement was furnished a full and true statement of accounts containing certain prescribed particulars, within three months after the 31st March next following the date on which the statement referred to in section 3 had been furnished.

Section 6-A (1) enacts:

"Notwithstanding anything contained in section 3 it shall be competent to the Court on failure of a mutawalli to furnish a statement as required under the said section to require the mutawalli to furnish within such time as the Court shall fix a statement containing all or any of the particulars referred to in the said section."

Section 6-B contains similar provisions on failure of a mutawalli to furnish a statement of accounts under section 5.

Under the provisions of section 6-C of the Act—

"(1) The Court may, either of its own motion or upon the application of any person claiming to have an interest in a wakf, hold an inquiry in the prescribed manner at any time to ascertain—

(i) Whether a wakf is a wakf to which this Act applies;

(ii) Whether any property is the property of such wakf and whether the whole or any substantial portion of the subject-matter of such wakf is situate within the local limits of the jurisdiction of the Court; and

(iii) Who is the mutawalli of such wakf.

(4) On completion of the inquiry provided for in sub-section (1) . . . . . , the Court shall record its finding as to the matters mentioned in the said sub-section . . . ."

By section 6-F it is provided that:

"The entries made by the Court in the register of wakfs and the findings recorded under section 6-C shall, subject to the provisions of section 6-C, be final for the purposes of this Act."

By section 6-L of the Act:

"(1) There shall be constituted in each district a Wakf Committee to advise and assist the Court in all matters relating to the registration, superintendence, administration and control of wakfs."

And by section 6-M:

"(1) It shall be competent to the Court to refer at any time to the Wakf Committee or any three or more members thereof, for advice, opinion, enquiry, report or recommendation, ... any matter relating to the registration, superintendence, administration and control of wakfs and in particular any matter relating to

(a) the conduct of a mutawalli or a trustee in the administration of a wakf or his fitness to continue as a mutawalli or a trustee;

(b) the settlement, cancellation or alteration of a scheme for the administration of a wakf; or

(c) the application of the funds of a wakf or any surplus thereof."

By section 10:

"Any person who is required by or under section 3 . . . or section 6-A . . . to furnish a statement of particulars . . . . or who is required by section 5 or section 6-B to furnish a statement of accounts . . . . shall if he, without reasonable cause, the burden of proving which shall be upon him, fails to furnish such statement. . . . . be punishable with a fine which may extend to five hundred rupees. . . . ."

The appellant is a member of the Dawoodi Bohra Community and is alleged to be mutawalli of certain property, said to be wakf property. This property is in fact situate within the jurisdiction of the Court of Small Causes at Bombay.

On 27th September, 1938, the appellant was served with a notice, dated 19th January, 1938, issuing out of the Court of Small Causes at Bombay, requiring him to appear before the Chief Judge of the said Court to show cause, if any, why he had failed to furnish statements of particulars and accounts under sections 3 and 5 of the Act, respectively, in respect of this property. The appellant resisted the notice on the grounds that the property in question was not wakf property and that he was not its mutawalli. He said that the property had been donated as a gift by his forefathers to His Holiness the Mullaji Saheb in whom it was now vested. The Chief Judge referred the matter to a Sub-Committee of the Wakf Committee for investigation and report and the Sub-Committee reported that: (A) there was no evidence that the Mullaji Saheb was connected with the property; (B) there was conclusive evidence that the property was managed by the appellant on behalf of his firm for the benefit of the Dawoodi Bohra Jamat without any interference or intervention by the Mullaji Saheb; (C) there was no recorded instance of accounts having been rendered, and balances paid over, to the Mullaji Saheb; (D) the rents received from the property had been credited, and expenses incurred debited, to a special account opened in the books of the appellant's firm; and (E) there was evidence that the property had been used for charitable purposes for twenty or forty years. The conclusion of the Sub-committee was that the property in question was a wakf property.

On the case coming up again in the Court of Small Causes, before another Judge of that Court, the Judge, by his judgment dated 4th September, 1939, found himself in entire agreement with the conclusion of the Sub-Committee and ordered the appellant to furnish within thirty days from the date of the judgment a statement of particulars under section 3 of the Act (in the form in schedule D of the Wakf Rules) and a statement of accounts under section 5 of the Act (in the forms in schedules A and B of these rules) in respect of the property, in default of which the sanction required by section 10-B (1) would be given for his prosecution for an offence under section 10 of the Act. The appellant refused to obey this order, and, therefore, in accordance with its terms, sanction for his prosecution was granted on 9th October, 1939. At his prosecution in the Court of the Presidency Magistrate, 4th Court, at Girgaum, Bombay, the appellant pleaded "not guilty," and, in a written statement, denied that the Act applied to the property in question, or that he was its "mutawalli" within the meaning of that word as defined in the Act.

By his judgment, dated 9th August, 1941, the Magistrate found the appellant guilty and convicted him under section 10 read with section 6-A of the Act for failing to furnish a statement of particulars of the property in question and sentenced him to pay a fine of Rs. 201, or in default to suffer two months' simple imprisonment. The Magistrate was of opinion that as the findings of the Judge of the Court of Small Causes had been recorded under section 6-C (4) of the Act, the appellant was precluded by section 6-F thereof, from questioning their validity. Against his conviction and sentence, the appellant appealed to the High Court of Judicature at Bombay. His appeal was heard by a Bench consisting of Beaumont, C.J., and Wadia, J., who set aside the conviction, ordered refund of the fine imposed (if paid) and remanded the case to the Magistrate for re-trial.

Beaumont, C.J. (with whose judgment Wadia, J., agreed) was of opinion that the Chief Judge of the Court of Small Causes had no jurisdiction, under section 6-M of the Act, to refer the question whether the property was or was not wakf property to the Wakf Committee, that being a matter which could be enquired into only by the Court itself under section 6-C; and that it was open to the appellant to say that he did not know that an enquiry under section 6-C was being held, or that the Judge of the Court of Small Causes would record findings in respect of matters which would be covered by an enquiry under that section. He concluded this part of his judgment by saying:

"On that ground we must send the matter back to the learned Magistrate to be dealt with on the basis that there has not been any recorded finding under section 6-C."

The learned Chief Justice, however, added at the end of his judgment:

"There is one other matter which I desire to mention. Experience seems to show that the Dawoodi Bohra Community are very reluctant to accept this Act, and mutawallis of wakfs created by that community are reluctant to render accounts. We are not, of course, concerned with the merits of any question of that sort. All that the Court has to do is to see that the law is enforced. Now, here we have a specific order made apparently under section 6-A directing certain particulars and accounts to be delivered by the accused within a certain fixed period. That order has been disobeyed. On the face of it that seems to show that the accused has been guilty of contempt of the Court of Small Causes, and that is a matter which this Court may deal with under the Contempt of Courts Act, 1926. The matter has, of course, not been considered up to the present moment, but we propose to serve notice upon the accused and upon the Public Prosecutor to show cause why the accused should not be committed to prison, or otherwise dealt with, under the Contempt of Courts Act, for his contempt in having disobeyed the order made by the Acting Chief Judge of the Small Cause Court on 4th September, 1939, directing him to furnish within 30 days from the date of the order a statement of particulars under section 3 (in the form in schedule D) and a statement of accounts under section 5 (in the form of schedules A and B), Mussalman Wakf Act, in respect of the wakf property at Falkland Road, C. S. No. 170 of Tardeo Division."

By section 2 (1), Contempt of Courts Act, 1926 (XII of 1926), a High Court of Judicature in India established by Letters Patent (the High Court at Bombay was so established) has and exercises the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of a contempt of Court subordinate to it, as it has and exercises in respect of contempts of itself, except that section 2 (3) provides that no High Court shall take cognizance of a contempt of a Subordinate Court, where such contempt is an offence punishable under the Penal Code.

By section 3 of the said Act, save as otherwise provided by any law, a contempt of Court may be punished with simple imprisonment for a term which may extend to six months or with a fine which may extend to Rs. 2,000 or both. In accordance with the directions of the High Court, a notice was issued out of that Court, and served upon the appellant requiring him to appear and show cause why he should not be committed to prison or otherwise dealt with under the Contempt of Courts Act, 1926, for his contempt of the Court of Small Causes at Bombay caused by his disobedience to the order of that Court, dated 4th September, 1939. The contempt proceedings which followed came up before Beaumont, C.J. and Wadia, J. who by judgment, dated 2nd December, 1941, found the appellant guilty of contempt of the Court of Small Causes and imposed a fine of Rs. 1,000 upon him, to be paid into Court within one week, in default of payment of which the notice to show cause was to be restored to the list. In the course of his judgment the Chief Justice said:

"The respondent (the present appellant) has refused, and still refuses, to obey the order. His contention is that the order was wrong because the property in respect of which it was made is not wakf property. But if that was his contention, he could have filed a suit in the High Court for a declaration to that effect and applied for a stay of the order of the Small Cause Court. He did not do that, and the order has been in force, and has been disobeyed for over two years. He also says that he understood from the direction to prosecute in default of compliance with the order, that that was the only penalty which he would incur. We have, however, offered him further time in which to comply with the order, but he says, through his counsel, quite definitely, that he does not intend to comply with the order.

As this is the first case of the kind which has come before the Court, we do not propose to send the respondent to prison, without the option of paying a fine. But we wish to make it perfectly clear that orders of the Court are to be obeyed and, in future when the Chief Judge of the Small Cause Court makes a specific order under section 6-A, Wakf (Amendment) Act, directing accounts to be furnished within a limited time, and that order is disobeyed, this Court will not hesitate to enforce obedience to the order by sending the disobeying party to prison, where he may remain for a period not exceeding six months under the Contempt of Courts Act."

As a consequence of this judgment, on 10th March, 1942, the Public Prosecutor for Bombay applied to the Presidency Magistrate, Fourth Court, Bombay, for leave to withdraw the charge against the appellant under section 10 read with section 6-A of the Act, which had been remitted by the High Court to the Presidency Magistrate, by its order of 12th November, 1941. This leave was granted and the appellant was accordingly acquitted of the charges under section 494 (b), Criminal

Procedure Code. Against the judgment and order of the High Court, dated 2nd December, 1941, the appellant applied to His Majesty in Council for special leave to appeal which, by an Order-in-Council, dated 6th August, 1942, was granted to him. The present appeal to His Majesty in Council is accordingly against the above-mentioned judgment and order of the High Court dated 2nd December, 1941.

As to this matter, their Lordships would observe in the first place that there is still in existence and in force the order of the Court of Small Causes, dated 4th September, 1939, which has never been appealed or set aside and which the appellant has refused and neglected to obey. *Prima facie* he is, as the High Court has pointed out, in contempt. Three objections, however, are taken to the order of the High Court:

(1) It is said that the remedy of committal for contempt of Court is arbitrary and unlimited and should be most jealously and carefully watched and should only be exercised with the greatest reluctance and the greatest anxiety on the part of Judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject. This contention is in substance a repetition of the language of Sir George Jessell, M.R., in *Costa Rica* v. *Erlanger*: In re *Clements*[1]. Their Lordships have no desire to lessen the standard of care and circumspection to be observed by all Courts before exercising their jurisdiction to commit for contempt, but it must be remembered that the question of committal or non-committal is one for the exercise of the discretion of the Court before whom the application to commit is brought and unless there is found to be a serious disregard of the principles of natural justice, their Lordships would be slow to interfere with that discretion. But indeed it has not been contended that there has been such disregard; rather it is said that the appellant could have been prosecuted and convicted under the Wakf Act if proper steps had been taken to establish before the learned Magistrate that the appellant was mutawalli of wakf property, and that, in those circumstances, the arbitrary remedy of committal should not have been adopted. On this matter their Lordships agree with the observations of the learned Chief Justice already quoted as to the necessity of obedience to the orders of the Small Cause Court and do not accept the contention that the discretion of the High Court was wrongly exercised.

(2) The appellant, however, argued in the second place that the Court had no discretion in the matter. If, it was said, there is, in the case of an offence created by statute, procedure for punishment prescribed, that procedure should alone be followed and committal for contempt should not be resorted to for inflicting collateral or additional punishment. The argument was put both as a matter of right and of discretion.

As to discretion their Lordships have nothing to add to what they have already said. The contention however that a Court cannot commit for contempt if any other remedy exists is novel and no authority to that effect was quoted, or is known to their Lordships. The argument presented in the past to the Court, when a question of this kind has arisen, has been, not that the existence of another remedy precludes the application of the remedy of attachment but that if there be two remedies, one by indictment and the other by committal, for contempt, the former ought to prevail inasmuch as it is more desirable that these matters should be determined by a jury than by the Court summarily. Such an argument was presented in *R.* v. *Almon*[2], but did not prevail. No doubt the fact that there is another remedy available is a matter for the Court to consider when exercising its discretion whether to commit or not to commit, but on the other hand, the desirability of speed and the necessity of ensuring that the orders of the Court should be obeyed are also matters of importance. The Court may, therefore, consider that after two years of disobedience a heavier fine than that permitted by the Wakf Act should be imposed, or in a proper case that imprisonment should be awarded. An argu-

1. (1877) 46 L.J.Ch. 375 at 381 and 382 : 36 L.T. 332.
2. (1765) Wilm. 243 : 97 E.R. 94.

ment was at one time presented to their Lordships based upon section 26, General Clauses Act, which runs as follows :—

"When an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

Having regard to their Lordships' view, it is not necessary for them to decide whether the section applies or not. If it did their Lordships would point out that inasmuch as the prosecution has now been withdrawn the appellant will suffer only one punishment, *viz.*, a fine for his contempt and will not be punished twice. Finally it was said that by reason of the provisions of the Contempt of Courts Act, 1926 (Act XII of 1926) the High Court had no jurisdiction to punish contempts of the orders of the Court of Small Causes. Section 2 (1) of that Act provides that :—

"Subject to the provisions of sub-section (3), the High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

This sub-section would if it stood alone give the High Court the authority required, but it is qualified by the terms of sub-section (3) which is said to take away the jurisdiction of the High Court in the present case. Sub-section (3) reads as follows :

"No High Court shall take cognizance of a contempt alleged to have been committed in respect of a Court subordinate to it where such contempt is an offence punishable under the Indian Penal Code."

The appellant relied upon this sub-section and contended that the contempt of which he was found guilty was an offence punishable under the Penal Code. He maintained therefore that the High Court had no cognizance of it. To this contention two answers were made : (1) It was said that upon its true construction the sub-section only prohibited the High Court from dealing with offences punishable under the Code as contempt and that there is no provision in the Code making this particular offence punishable as contempt. The view that sub-section (3) has reference only to cases where the Penal Code empowers the Court to punish for contempt as contempt appears to have commended itself to some of the Courts of India : see *Kaulashia* v. *Emperor*[1] and *Jnanendra Prasad Bose* v. *Gopal Prasad Sen*[2]. Having regard to their Lordships' view that the contention that the contempt of which he was found guilty was an offence punishable under the Penal Code is unsound for the reasons hereafter given, their Lordships do not find it necessary to determine this matter. (2) Secondly, however, it was maintained that the appellant had not committed an offence punishable under the Penal Code. That he had committed an offence against the Mussalman Wakf Act was admitted, but it was said that that is not enough : to take away the High Courts' powers some offence against the provision of the Penal Code must be relied upon and none had been established. The argument was put in this way : The only section of the Penal Code which could be prayed in aid as creating a crime of which this appellant might be guilty is section 176 which so far as is material runs as follows :

"Whoever *being legally bound* to furnish information on any subject to any public servant as such intentionally omits to furnish such information in the manner and at the time required by law shall be punished with imprisonment or fine."

Italics are used to stress the words to which in their Lordships' view attention must in particular be directed. It is common ground (1) that there is in existence a valid order of the Court of Small Causes ordering the appellant to furnish information ; (2) that the order directs that the information be given to the Court ; (3) that a Judge of the Court is authorized to receive it and is a public servant to whom the information is to be given as such ; and (4) that the appellant has intentionally omitted to furnish it. But the question still remains was he legally bound to furnish

1. (1933) I.L.R. 12 Pat. 1. 2. (1932) I.L.R. 12 Pat. 172.

it within the meaning which those words bear in the Code. The expression has been defined in section 43 of the Act in these words :

"The word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action, and a person is said to be 'legally bound to do' whatever it is illegal in him to omit."

According to this definition the appellant is only legally bound to do what it is illegal for him to omit and it is only illegal for him to omit what is an offence or prohibited by law or is ground for a civil action.

The furnishing of the information required is not prohibited by law—it is enjoined by law—nor does its omission furnish ground for a civil action. Is it then an "offence"?

It is no doubt an "offence" if that word be used in its ordinary meaning, but "offence," like "legally bound to do" has a technical meaning in the Code. It is defined in section 40 which says : "Offence denotes a thing made punishable by this Code." It follows that an act or omission is not an "offence" as that word is used in the Code if it is punishable only under some other enactment.

If then sections 40, 43 and 176 be read together, the result follows that one who fails to furnish information which he is legally bound to furnish is punishable under section 176, that he is legally bound to furnish what it is illegal for him to omit, that it is illegal for him to omit what is an offence and that an offence is what is punishable under the Code.

The only conclusion therefore to be derived from this language appears to be that what is punishable under the Code is punishable under section 176 of the Code. The statement is no doubt true but it is not of much assistance in ascertaining what is punishable under the Code. To answer that enquiry one must look elsewhere than to section 176 and if no other section of the Code deals with the matter, then one must conclude that the particular crime may be punishable under some other enactment but it is not punishable under the Code.

It follows in the present instance that though the failure to furnish information is an offence under the provisions of the Wakf Act yet it is not an offence punishable under the Penal Code. Consequently the High Court is not prohibited from dealing with it by the terms of section 2 (3), Contempt of Courts Act.

This conclusion disposes of the last argument presented to their Lordships against the jurisdiction of the High Court to commit for contempt in this case, and as in their Lordships' opinion the other contentions put forward on the appellant's behalf fail also, their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for Appellant : *T. L. Wilson and Co.*

Solicitors for the Crown : *Solicitor, India Office.*

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT :—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Nur Mohammad .. *Appellant**

v.

Emperor .. *Respondent.*

Appeal against acquittal—Scope of the power of the High Court to review evidence.

The High Court has full power to review at large all the evidence upon which an order of acquittal is founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed.

Where the High Court judgment shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving a particular group of witnesses, there is no ground for invoking the assistance of the Board on account of any miscarriage of justice or the like matter.

*P. C. Appeal No. 21 of 1945. 10th July, 1945.

S. P. Khambatta for Appellant.

G. D. Roberts and *C. Bagram* for the Crown.

Their Lordships' Judgment was delivered by

LORD THANKERTON.—In the present appeal only one question has been raised and that, as stated in the order granting leave, is a contention that the trial Court "having held there was no evidence at all on which any conviction could be based a Court of Criminal Appeal is not justified in reversing the Court of first instance by placing reliance on the very evidence which had been entirely rejected by the Court of first instance."

Their Lordships were referred, rightly enough, to the decision of this Board in the case in *Sheo Swarup* v. *Emperor*[1], and in particular to the passage at p. 404 in the judgment delivered by Lord Russell. Their Lordships do not think it necessary to read it all again, but would like to observe that there really is only one principle, in the strict use of the word, laid down there; that is, that the High Court has full power to review at large all the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. Then follows an expression, under four headings, of what would be the proper practice, and their Lordships think is the proper practice, for the High Court to follow in considering whether they should reverse the decision of the Sessions Judge. At the foot of the page there is a paragraph expressing a view which is quite common in such cases, that the Board will always assume that a Court has followed the proper practice unless something appears which proves the contrary.

In the present case the High Court judgment shows that they have been at pains to deal in detail with the reasons given by the Sessions Judge for disbelieving the group of witnesses, the Patwari and the other three alleged eye-witnesses. They have dealt in detail with them, showing on the face of their judgment that there is no necessity to presume in this case that they have not done their duty, because on the face of the judgment they have been at pains to do so. In that view their Lordships are of opinion that there is no ground for invoking the assistance of this Board on account of any miscarriage of justice or the like matter, and that this appeal should be dismissed. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for the Crown: *Solicitor, India Office.*

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

K. Appa Rao .. *Appellant**

v.

Gopal Doss and another .. *Respondents.*

Principal and agent—Authority to sell—Construction—Scope and binding nature—Difference between authority to sell and authority to find a purchaser.

The first defendant wrote the following letter to the second defendant: "I hereby agree to give you brokerage of two per cent. that is Rs. 540 for negotiating and completing the sale of my bungalow No. 3, Vasu Street, Poonamallee High Road, Kilpauk, Madras, the same to be paid only on completing the transaction and as soon as the sale deed is registered provided the offer is for Rs. 27,000 nett, that is, all expenses to be borne by the purchaser. Time for this is up to 6th November, 1941, after which date this letter will be null and void." The second defendant entered into a contract with the plaintiff on the 5th November, 1941, for the sale of the said house to him on the terms fixed in the letter of authority given by the first defendant to the second defendant. The first defendant refused to honour that contract and the plaintiff thereupon sued both the first and second

---

1. (1934) 67 M.L.J. 664 : L.R. 61 I.A. 398 : I.L.R. 56 All. 645 (P.C.).

* O. S. A. No. 68 of 1944. 23rd July, 1945.

defendants for damages for the breach of the contract to sell the house entered into by the second defendant on behalf of the first defendant and within the scope of his authority.

On the question whether the second defendant was authorised to contract for the sale of the house,

Held, that there was in the letter written by the first defendant, clear authority given to the second defendant to negotiate and complete the sale of the house on behalf of the first defendant provided the conditions mentioned therein were satisfied. The authority was not to negotiate and refer back but to negotiate and complete the contract, provided that the terms entered into were those stated in the letter. There is a substantial difference between an authority to sell and an authority to find a purchaser. Each case must, of course, depend on the nature of the authority, but when an agent is authorised to negotiate and complete a sale for a specified price within a particular time, it gives him authority to enter into a contract for sale whether it be for immoveable or moveable property. The second defendant was so authorised and the contract which he entered into fell within the terms of his authority and hence the first defendant would be liable for the breach of the contract.

On appeal from the judgment and decree of Chandrasekhara Aiyar, J., dated 16th November, 1944, and passed in the exercise of the ordinary original civil jurisdiction of the High Court in C. S. No. 29 of 1944.

S. Srinivasaraghavan and *K. Gopalaswami* for Appellant.

The Advocate-General (*P. V. Rajamannar*) and *K. Subba Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether the second defendant was authorised to sell a house owned by the first defendant. The plaintiff, who is the appellant, sued on the original side of this Court for damages for the breach of a contract to sell to him a house. He says that the first defendant gave full authority to the second defendant to sell the house on his behalf and that the second defendant entered into a contract with him within the scope of this authority. The first defendant refused to honour the contract, and sold the property to a third party for the sum of Rs. 32,000. The suit was for recovery of damages in the sum of Rs. 5,000 being the difference between the price at which the plaintiff agreed to buy the property and its true value, as shown by the sale to the third party. The plaintiff asked for a decree against both the defendants for a sum of Rs. 5,114. It is now admitted that the figure should only be Rs. 5,000. The learned trial Judge (Chandrasekhara Aiyar, J.) dismissed the suit against both the defendants on the ground that the second defendant had not authority to contract with the plaintiff. We find ourselves unable to share the opinion of the learned Judge.

On the 22nd October, 1941, the first defendant wrote this letter to the second defendant:

"I hereby agree to give you brokerage of two per cent. that is Rs. 540 for negotiating and completing the sale of my bungalow No. 3, Vasu Street, Poonamallee High Road, Kilpauk, Madras, the same to be paid only on completing the transaction and as soon as the sale deed is registered provided the offer is for Rs. 27,000 nett, that is, all expenses to be borne by the purchaser. Time for this is up to 6th November, 1941, after which date this letter will be null and void."

There is here clear authority given to the second defendant to negotiate and complete the sale of the property on behalf of the first defendant provided that (1) the contract of sale was entered into by the 6th November, 1941, (2) that the purchaser bore all the expenses of the sale, and (3) that the vendor received Rs. 27,000 without any deduction.

On the 5th November, 1941, the second defendant wrote to the plaintiff in these terms:

"As authorised by the owners I offer your firm the abovesaid property for Rs. 27,000 nett, all expenses to be borne by the purchaser. This offer holds good for three hours (*i.e.* till 12 A.M. to-day). If you accept please send some advance. I herewith enclose my authorisation letter."

Within the three hours the plaintiff replied:

"We accept your offer of No. 3, Vasu Street, for Rs. 27,000 nett, and on terms indicated in your authorisation letter and herewith give you a cheque for Rs. 101 as advance. Please kindly have the documents sent for inspection and drafting the sale deed."

It is obvious that the first defendant was determined to repudiate the authority given by him to the second defendant because by the 5th November, 1941, he himself had agreed to sell the property to another person for Rs. 32,000. In a

letter written on the 8th November, 1941, through an advocate, to the second defendant's advocate the first defendant stated that he had cancelled the letter of authority given to the second defendant because the latter had stated that the property was to be purchased by a charitable institution and had promised to get a minimum advance of Rs. 1,000. We can only regard this letter as an unscrupulous attempt to avoid the contract which the second defendant had entered into with the plaintiff.

In holding that the letter of the 22nd October, 1941, signed by the first defendant and delivered to the second defendant, did not authorise the latter to complete the sale Chandrasekhara Aiyar, J., relied on *Hamer* v. *Sharp*,[1] and *Chadburn* v. *Moore*[2]. The learned Judge did not regard *Rosenbaum* v. *Belson*[3] as being in point. Here we respectfully differ from the learned Judge. We consider that the case does fall within the judgment of Buckley, J., (as he then was) in *Rosenbaum* v. *Belson*[3]. As we have pointed out, the authority in the present case was not to negotiate and refer back but to negotiate and complete the contract, provided that the terms entered into were those stated in the letter.

In *Rosenbaum* v. *Belson*[3], the authority to the agent was couched in these terms :

"Please sell for me my houses 75, 77, 79, 79-A, 81, 83 Wellesley Street, Stepney Green and I agree to pay you by way of commission the sum of 2½ per cent. on the purchase price accepted."

It was held that this gave authority to the agent to make a binding contract, including an authority to sign an agreement for sale. In so holding Buckley, J., examined the judgment of Hall, V.C. in *Hamer* v. *Sharp*[1], where the learned Vice Chancellor said :

"The question is whether, when an owner of an estate puts it into the hands of an estate agent for sale, stating a price for and giving particulars of the property to enable him to inform intending purchasers, but giving no instructions as to the absolute disposal, and none as to the title of the property, and mentioning none of those special stipulations which it might be proper to insert in conditions in reference to the title, that is sufficient authority to the agent to sign a contract for the sale of the property for the price stated in the instructions, without making any provision whatsoever as to title."

It is this passage which impressed Chandrasekhara Aiyar, J. But it is important to remember, as was pointed out by Buckley, J., that in *Hamer* v. *Sharp*[1], the authority was not to sell, but to find a purchaser and that there is a substantial difference between the two expressions. In the words of Buckley, J., "authorising a man to sell means an authority to conclude a sale; authorising him to find a purchaser means less than that—it means to find a man willing to become a purchaser, not to find him and also make him a purchaser."

In the judgment under appeal reference was made to *Chadburn* v. *Moore*[2], because Kekewich, J., had pointed out that an agent for sale of real estate must be more formally constituted than a seller of stocks and shares and securities of a similar nature. Each case must, of course, depend on the nature of the authority, but when an agent is authorised to negotiate and complete a sale for a specified price within a particular time, it gives him authority to enter into a contract for sale, whether it be for immoveable or moveable property. The second defendant was so authorised and the contract which he entered into fell within the terms of his authority.

The appeal must be allowed. There will be a decree against the first defendant for Rs. 5,000 with interest at the Court rate from the date of the judgment of Chandrasekhara Aiyar, J., namely the 16th November, 1944. The plaintiff will have his costs here and below against the first defendant who has not contested the appeal. It will be dismissed with costs against the second defendant.

V.S. *Appeal allowed.*

---

1. (1874) 19 Eq. 108.
2. (1892) 61 L.J. (Ch.) 674.
3. (1900) 2 Ch. 267.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

The Crown Prosecutor, Madras .. *Appellant**

v.

V. R. Ramanatha Aiyar .. *Respondent.*

Madras Prevention of Adulteration Rules (1932), *rule* 28-B—*Ingredient —Meaning—Ghee in which a sweetmeat is fried not an ingredient of the sweetmeat.*

The material used for cooking the sweetmeat called *jangiri* is not an ingredient of it. The ingredients are blackgram, rice and sugar and they have to be cooked together by frying in ghee in order to make that sweetmeat ; but this does not mean that the cooking material is part of the sweetmeat. No doubt some of the cooking material does penetrate into the sweetmeat but that does not make it an 'ingredient' within the meaning of that term in rule 28-B of the Madras Prevention of Adulteration Rules.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (Accused) by the Chief Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras in M. No. 187 of 1944 on his file on 15th January, 1945.

The Crown Prosecutor (*P. Govinda Menon*) in person.

V. Rajagopala Mudaliar for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal by the Provincial Government against the acquittal by the Chief Presidency Magistrate of the respondent on a charge framed under rule 28-B of the Madras Prevention of Adulteration Rules, 1932, framed under the Prevention of Adulteration Act. The respondent is the Proprietor of a restaurant known as "The Ramakrishna Lunch Home" in China Bazar Road, Madras. He makes and sells a sweetmeat called *jangiri*. The ingredients of *jangiri* are blackgram, rice and sugar. The sweetmeat is generally made by frying the ingredients in ghee. It is said that in some hotels oil is used for this purpose. On the 25th February, 1944, a Food Inspector visited the respondent's restaurant and purchased a quantity of *jangiri* which was then being offered for sale. He had a sample analysed by the Public Analyst of the Corporation of Madras, who found that the fat used for cooking this particular *jangiri* consisted of 50 per cent. ghee and 50 per cent. fat not derived from milk or cream.

Rule 28-B says that where in a hotel, shop or other place sweetmeats, savouries or other articles of food of which ghee is commonly an ingredient are for sale and are prepared wholly or in part with a mixture referred to in rule 28 or with oil or fat other than ghee, there shall be exhibited in the hotel, shop or other place one or more notices of such size and so placed as to be visible and clearly legible to any customer at the time of purchase that the sweetmeats, savouries, or other articles of food are not made of ghee. There was no such notice exhibited in the respondent's restaurant and consequently it is said that he infringed this rule. The Chief Presidency Magistrate held that ghee or oil or other fatty substance used for frying *jangiri* is not an ingredient of the sweetmeat and consequently he acquitted the respondent.

The Chief Presidency Magistrate accepted the definition of "ingredient" as given in Chambers' Dictionary, namely,

"that which enters into a compound ; a component part of anything."

One definition of the word given in the Oxford Dictionary is :

"something that enters into the formation of a compound ; a component part, constituent element."

---

* Criminal Appeal No. 276 of 1945. 26th July, 1945.

We agree with the Chief Presidency Magistrate that the material used for cooking *jangiri* is not an ingredient. The ingredients are blackgram, rice and sugar and they have to be cooked together in order to make *jangiri*; but this does not mean that the cooking material is part of the sweetmeat. No doubt, some of the cooking material does penetrate into the *jangiri* but that does not make it an ingredient. If the argument advanced by the Crown Prosecutor were to be accepted, it would mean that the fat used in frying fish must be regarded as an ingredient of the fish.

The appeal is dismissed.

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh).

PRESENT:—LORD PORTER, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Madan Theatres, Ltd. .. *Appellants**

v.

Dinshaw & Co., Bankers Ltd., through Official Liquidator .. *Respondents*.

Civil Procedure Code (V of 1908), Order 21, rule 2, Order 23, rule 3 and Order 34, rule 5—Agreement for adjustment of mortgage debt prior to preliminary decree in mortgage suit—If could be pleaded in defence to an application for a final decree—Competency of Court to recognise and enforce it.

After the institution of a suit on a simple mortgage, an agreement was entered into between the parties for the adjustment of the mortgage debt. While other arrangements in modification of this agreement were being made, a preliminary decree was passed in favour of the mortgagee for a particular amount with future interest. An application was made for a final decree. It was resisted by the mortgagors on the ground that the entire claim of the mortgagees had been satisfied by the fulfilment of the agreements entered into between the parties. On a question as to whether such agreements could be pleaded in defence and recognised and enforced in view of Order 21, rule 2, and Order 34, rule 5, Civil Procedure Code,

Held, rule 2 of Order 21, Civil Procedure Code only applies in execution and as execution does not begin until after a final order for sale has been passed the rule has no application when the question is whether or no a final decree for sale should be passed. A suit continues up to final decree and hence any adjustment or satisfaction up to that time must be taken into account. Though a decree holder need not agree to any adjustment or accept payment otherwise than into Court, it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received. There is nothing to qualify the wide terms of rule 3 of Order 23, Civil Procedure Code nor any grounds for limiting its application. There is no time limit for recording the agreement arrived at as there is under rule 2 of Order 21.

In the circumstances, the Judge should have satisfied himself as to whether any adjustment had been arrived at or payment made, and followed this enquiry by an appropriate decree under which a finding of full satisfaction would lead to the dismissal of the suit and partial satisfaction to a diminution of the indebtedness whereas a finding that there had been no adjustment or satisfaction would be followed by a final decree for sale.

Madan Theatres, Ltd., Calcutta v. *Dinshaw & Co., Bankers, Ltd.*, (1942) I.L.R. 18 Luck. 71, reversed.

Sir Herbert Cunliffe and *S. P. Khambatta* for Appellants.

Respondents *Ex parte*.

Their Lordships' Judgment was delivered by

LORD PORTER.—This is an appeal from a judgment and decree of the Chief Court of Oudh[1] at Lucknow dated 17th March, 1942, which affirmed a judgment and decree of the Court of the Civil Judge at Lucknow dated 23rd May, 1940. The facts may be shortly stated. On 2nd July, 1931, the appellants executed a simple mortgage deed for Rs. 1,50,000 in favour of the respondent bank. Some portion of this sum was paid off but on 25th August, 1934, the bank instituted a mortgage suit against the appellants in the Court of the Subordinate Judge of Lucknow to recover Rs. 78,542-1-3 by sale of the mortgaged property. The bank also filed an application with the plaint praying for an attachment before judgment, and the appointment of a receiver in respect of a portion of the hypothecated property and on 11th September, 1934, the Court of the Civil Judge passed an order

* P. C. Appeal No. 6 of 1944. 18th July, 1945.

1. (1942) I.L.R. 18 Luck. 71.

granting this application and appointing a receiver. On 18th September, an agreement was entered into between the parties whereby the exploitation rights in four films were to be sold at Rs. 12,500 each and the amounts to be credited to the appellants in part payment of the mortgage debt.

By clause 3 of that agreement, the respondents were to credit to the mortgage account of the appellants the sum of Rs. 12,500 for each film as soon as two prints of any of the four films should be delivered to the respondents and the respondents were to enter satisfaction in the decree in the Court to that extent immediately on getting delivery. Subsequently at a date not stated in the record the appellants sold to the respondents the exploitation rights in another film for Rs. 17,500 for which Rs. 10,000 was paid in cash and Rs. 7,500 was to be credited to the mortgage debt, and later still it was agreed that the transfer of the rights in three out of the four original films should be cancelled and that the rights in a sixth film should be transferred in their place but at a price of Rs. 75,000. These sums were to be in satisfaction of the mortgage debt and if there should be any excess in the hands of the respondents it was to be handed over to the appellants in cash.

On 30th November, 1934, whilst these arrangements were being made, a preliminary decree was passed in favour of the respondents against the appellants for a total sum of Rs. 83,359-6-11 with future interest at 6 per cent. per annum from 31st May, 1935. The exact date when the agreements varying that of 18th September, 1934, were made, does not appear but from a statement made by the appellants in the Chief Court of Oudh, from the arguments and contentions presented before it and the way in which the matter is dealt with by the Court it would appear that they were entered into after the preliminary decree. In any case it is plain that the delivery of the first and second films took place after that date and the third still awaits delivery and has not yet been taken over by the respondents.

On 15th October, 1935, the respondents went into liquidation and an Official Liquidator was appointed by the Court. On 29th September, 1937, the Official Liquidator filed an application for the passing of the final decree. The appellants resisted this application on the ground that the entire claim of the respondents had been satisfied by the agreements above-mentioned and their fulfilment by putting the films referred to at the disposal of the respondents. In reply the liquidator did not admit knowledge of the agreement of 18th September, maintained it was a nullity and unenforceable, and was made during the pendency of the suit and before the final decree was passed, that no payment of the amount due had been made in the manner set out in the preliminary decree, that the alleged payments or adjustments had not been certified as required under Order 21, rule 2, Civil Procedure Code, that as payment is denied no enquiry as to payment can now be made and finally, that the alleged agreement with regard to the Rs. 75,000 film was never entered into. On these contentions the following issues were framed:

1. (*a*) Whether the opposite party can set up the agreement alleged to have been entered into between the parties before the passing of the preliminary decree as an adjustment of the decree? (*b*) Whether the agreement was enforced after the passing of the preliminary decree? If so, its effect?

2. Whether an enquiry as to any payments made under the alleged agreement can be made in these proceedings?

3. Whether the alleged adjustment which has not been certified can be recognised by the Court?

Certain other issues dealing with an alleged transfer of the decree were also framed but are not material at this stage of the proceedings. The trial of the application was stayed for a time after the issues were framed but came before the Court at a later date and was decided on 23rd May, 1940, in favour of the respondents on the two grounds on which reliance was placed by the Official Liquidator, *viz.*, firstly, that there had been no payment as ordered in the preliminary decree and, secondly, that the agreement of 18th September, 1934, being anterior to the date of the preliminary decree could not be enforced and set up in defence thereafter.

The preliminary decree declared the amount due up to 30th May, 1935, to be Rs. 83,359-6-11 in all, ordered that the appellants should pay that sum into Court on or before 30th May, 1935, or any later date to which the Court might extend the time for payment with future interest at 6 per cent. per annum and further declared that in default of payment as aforesaid the respondents might apply for the sale of the mortgaged property.

The learned Judge held that inasmuch as that decree ordered payment into Court, nothing short of such payment would comply with the decree or be a protection to the appellants against a final order for sale. He accordingly made on 23rd May, 1940, a final decree for sale of the mortgaged property. This decision would appear to be correct if the preliminary decree had been passed after an adjustment had been made and all the terms agreed upon by way of adjustment had been carried out before the making of the preliminary decree. In that case the mortgagor's remedy would be to appeal against the preliminary decree. For the reasons hereafter stated, however, the decision is wrong where the adjustment is made or carried out after the preliminary decree has been passed.

From this decree an appeal was taken to the Chief Court of Oudh but was dismissed upon the ground that the agreement of 18th September, 1934, was made before and would not affect the preliminary decree and that once the preliminary decree was passed no future adjustments or payments by the mortgagor could be taken into account except possibly (1) sums admittedly paid, (2) sums paid in the presence of the Court, and (3) sums certified. It was held that except in such circumstances the appellants were not even entitled to put forward proof of any payments or adjustments alleged to have been made.

From this judgment the appellants have obtained leave to appeal and have appealed to His Majesty in Council, claiming the right to prove and, if proved, to take credit for the sums and adjustments upon which they rely. Unfortunately the respondents were not represented on the hearing, but their Lordships have heard a full and careful discussion of the points at issue which apparently have given rise to a conflict of view between various Courts in India. *Prima facie* a debtor should be entitled to take credit for any payments which he can prove to have made in respect of a mortgage debt. The only reason for prohibiting him from doing so would be that there was some valid law or regulation of the Court to the contrary. Such regulations are however contended to exist and reliance is placed on behalf of the respondents upon rules 2, 4 and 5 of Order 34, Civil Procedure Code.

Rule 2 provides that in a suit for foreclosure, if the plaintiff succeeds the Court shall pass a preliminary decree directing that if the defendant pays into Court the sum due within the time fixed the plaintiff shall deliver up the documents of title and if necessary put the defendant in possession of the mortgaged property.

Rule 4 adapts the same procedure to the case of an application for sale and adds that in default of payment in accordance with the preliminary decree the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property be sold.

Rule 5 (1) provides that where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of the amounts due the Court shall pass a final decree or order providing for the delivery up of documents and if necessary retransfer of the property and that the defendant be put in possession.

Sub-rule (3) provides that where payment in accordance with sub-rule (1) has not been made the Court shall on application made by the plaintiff on that behalf pass a final decree directing that the mortgaged property be sold.

Rules 2 and 4 of this Order, it was said, visualised and the preliminary decree made in this case directed payment into Court, and rule 5 was mandatory in declaring that if that direction was not complied with the Court must pass a final decree for sale.

Admittedly no payment into Court had been made and therefore, it was contended, the Court was obliged to pass a final decree for sale. It was at one time also contended that in any case any payment made in respect of the mortgage debt could not be relied upon unless certified under Order 21, rule 2. But, apart from the question whether the parties could not compromise a decree (as to which see *Oudh Commercial Bank, Ltd.* v. *Bind Basni Kuer*[1]), it has again and again been held in India that this rule only applies in execution, that execution does not begin until after a final order for sale has been passed and that therefore the rule has no application when the question is whether or no a final decree for sale should be passed. Their Lordships agree with the Courts in India in this respect.

As regards the main argument, their Lordships do not stop to consider the question whether the provisions of Order 34 are, if they stood alone, sufficiently precise to prohibit the compromise of the preliminary decree in a mortgage suit by payment or adjustment in some way other than that directed by the preliminary decree, since the question of adjustment is specifically dealt with in Order 23, rule 3, which is as follows :

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit."

The appellants contend that this rule makes direct provision for the circumstances of the present case and say that so far from affirming the final decree the Chief Court should have recorded the satisfaction of the mortgage debt and passed a decree in accordance therewith provided it was proved to its satisfaction that the debt had been satisfied, and that to deny the appellants the opportunity of furnishing proof is to act in disregard of the express terms of the rule. This question has given rise to a wide divergence of opinion in the Courts of India. The stricter interpretation which has been adopted by the Chief Court in this case is that the terms of Order 34, rule 5, which have express reference to the making of a final decree in the case of an application for sale in a mortgage suit, override the terms of Order 23, rule 3, which is of general but not of particular application. This view has the support of the Courts in Oudh and Lahore and at any rate in the earlier cases of the Courts of Madras. Their Lordships have been referred to *Trilokinath Dube* v. *Sadhu Ram Tewari*[2], *Sewa Ram* v. *Parbu Dayal*[3], *Mazbut Singh* v. *Mt. Indrani*[4], *Mt. Durga Devi* v. *Nand Lal*[5], *Piara Lal* v. *Bulaqi Mal & Sons*[6], *Raja Ram* v. *Allahabad Bank, Ltd.*[7] and *Singha Raja* v. *Pethu Raja*[8].

One may summarise the decisions in these cases as determining that where the preliminary decree directs payment into Court no other method of payment is permissible: but that the harshness of this doctrine may be diminished in some three or four ways, *i.e.*, (1) acceptance of money in satisfaction or part satisfaction, (2) acknowledgment of payment, (3) payment not into Court but in the presence of the presiding Judge, (4) possibly the payment if certified.

Except in these cases the Court, it is said, cannot take notice of any payment out of Court. The fourth exception even if attention be paid only to the cases referred to above is not easy to accept since cases (*i*) and (*iv*) point out that Order 21, rule 2 applies only to cases where execution has begun and execution does not begin until the passing of the final decree. The other two exceptions seem to have been arrived at on no logical basis, but rather upon the injustice which would be perpetrated if they were not recognised. The Courts of Allahabad and Patna appear to have taken a contrary view to those of Oudh and Lahore; the latest Madras case has cast some doubt on the earlier ones and Calcutta seems to take a similar

1. (1939) 1 M.L.J. 652 : L.R. 66 I.A. 84 : I.L.R. 14 Luck. 192 (P.C.).
2. A.I.R. 1927 Oudh 275.
3. (1935) I.L.R. 11 Luck. 116.
4. (1936) I.L.R. 11 Luck. 500.
5. A.I.R. 1932 Lah. 231.
6. A.I.R. 1935 Lah. 168.
7. I.L.R. (1939) Lah. 313.
8. (1919) 35 M.L.J. 579 : I.L.R. 42 Mad. 61.

view to that of Allahabad and Patna. Reference may be made to *Inayat Khan* v. *Harbans Lal*,[1] *Munni Singh* v. *Collector of Benares*[2], *Ram Niwas* v. *Ram Dayal*,[3] *Jogendra Prasad Narain Singh* v. *Gouri Shankar Prasad Sahu*,[4] *Harihar Prasad Narain Singh* v. *Gopal Saran Narain Singh*,[5] and *Palaniappa Chettiar* v. *Narayanan Chettiar*,[6] and *Piran Bibi* v. *Jitendra Mohun Mukerjee*.[7]

It is true that the first of these cases leaves open the question whether a mere payment between preliminary and final decree without any adjustment would constitute a discharge of liability when it says :

" Whatever be the correct view on the question whether money paid out of Court in satisfaction of the decree in whole or part can be recognised by a Court when it is invoked to pass a final decree, it cannot refuse to act on Order 23, rule 3, if the conditions required are fulfilled."

In that case the Court pointed out that there had been not a mere payment but an adjustment. Even so limited an application of Order 23, rule 3 would suffice to establish the appellants' contention in the present case since adjustment followed by performance of the terms agreed is alleged.

The other cases, however, recognise that the suit continues up to final decree and consequently any adjustment or satisfaction up to that time must be taken into account. A decree-holder need not of course agree to any adjustment or accept payment otherwise than into Court but in their Lordships' opinion it is open to the debtor to allege and prove that an adjustment has taken place or payment in whole or in part has been made and received. Indeed to hold otherwise is to disregard the opening words of the order, (Order 23, rule 3) *viz.* : " Where it is proved to the satisfaction of the Court . . . ." Their Lordships see no qualification to the wide terms of the order (Order 23, rule 3) nor any grounds for limiting its application. Admittedly the suit continues until the final decree is passed and there is no time limit for recording the agreement arrived at as there is under Order 21, rule 2. In the present case, therefore, the Judge of the civil Court should have satisfied himself as to whether any adjustment had been arrived at or payment made, and followed this enquiry by an appropriate decree under which a finding of full satisfaction would lead to the dismissal of the suit and partial satisfaction to a diminution of the indebtedness whereas a finding that there had been no adjustment or satisfaction woud be followed by a final decree for sale. Their Lordships will accordingly humbly advise His Majesty that this appeal should be allowed, the final decree set aside and that the Subordinate Court should be directed to hear evidence and decide whether or not satisfaction wholly or in part has been made in respect of the mortagage debt and to pass a decree accordingly.

The respondents must pay the costs of the appellants before their Lordships and in the Courts in India.

Solicitors for Appellants : *T. L. Wilson & Co.*

Respondents *Ex parte.*

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Annalakshmi Ammal and another .. *Appellants**

v.

Shanmugam Pillai and others .. *Respondents.*

Specific Performance—Right to—Sale—Lease back to vendee with separate agreement to reconvey to him—Construction—Waiver of default in payment of rent—Acceptance of rent does not operate as waiver of rights under the agreement to reconvey—Non-fulfilment of conditions of the agreement—Right to demand specific performance of agreement to reconvey does not arise.

---

1. (1935) I.L.R. 58 All. 565.
2. A.I.R. 1939 All. 28.
3. A.I.R. 1939 All. 174.
4. (1917) 2 Pat. L.J. 533.
5. (1935) I.L.R. 14 Pat. 488.
6. (1935) 69 M.L.J. 765 : I.L.R. 59 Mad. 188 (F.B.).
7. (1917) 21 C.W.N. 920.

*Appeal No. 168 of 1944. 12th July, 1945.

Following the sale by the mortgagors of a portion of the mortgaged property in settlement of the mortgage claim, there was a lease back to one of the mortgagors of the property sold and a separate agreement to reconvey the property to him on certain conditions. The relevant clauses of the agreement were in the following terms:

"2. If this agreement does not stand cancelled under clause 3, *infra* this agreement shall be in force only up to 30th April, 1943. Time is the essence of this agreement.

3. Should the said party No. 2 without making payment of the amount in full, be in arrears in respect of any instalment out of the 7 instalments of the lease amounts payable in each year on the 30th April of the respective year and of the lease amount alone payable by 30th September, 1937, on the succeeding due date, *i.e.*, by 30th April, 1938, or, should he be in arrears without wholly paying the Sirkar kist, etc., pertaining to the lands covered by the lease, which he himself has promised to pay for the lease period, *i.e.*, from fasli 1345 (1935-36) to fasli 1352 (1942-43) as mentioned in the lease deed, this sale agreement shall stand cancelled forthwith without reference to the subsequent due dates and furthermore, the aforesaid party No. 2 shall forfeit all the rights and reliefs belonging to the said party No. 2 under this agreement. Subject to the aforesaid conditions alone, we have entered into this agreement of sale with mutual consent."

There were defaults in the payment of the lease amounts and acceptances of them after the the due dates. There was a tender of the whole sale price together with the last instalment of rent due and a demand for reconveyance. On the lessor contending that the agreement to re-sell stood cancelled, a suit was filed for a decree for the specific performance of the agreement to re-sell.

Held, that the terms of the lease and the terms of the agreement stood apart and that in accepting rent after the due dates the lessor had not waived his rights under the agreement. The fact that the lessor did not insist on the forfeiture of the lease did not affect the terms of the agreement to reconvey. The plaintiff could only insist on a reconveyance by fulfilling the terms of the agreement. In the circumstances, as the lessor had made it clear that in accepting payment of rent after due date he was still insisting on his right of ignoring the agreement for re-sale, because of the non-fulfilment of the conditions of that agreement, the plaintiff was not entitled to specific performance of that agreement for re-sale.

Appeal against the decree of the Court of the Subordinate Judge, Madura, dated 9th March, 1944, in O. S. No. 21 of 1943.

K. V. Krishnaswami Aiyar, R. Ramasubbu Aiyar and *K. Vaitheswaran* for Appellants.

The Advocate-General (*P. V. Rajamannar*) and *K. Subba Rao* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit filed in the Court of the Subordinate Judge of Madura for the redemption of an alleged mortgage by conditional sale and in the alternative for a decree for specific performance of an agreement to resell. Admittedly the suit on the basis of the alleged mortgage did not lie by reason of the proviso inserted in section 58 (*c*) of the Transfer of Property Act by the Amending Act of 1929. The learned Subordinate Judge found, however, that the plaintiffs were entitled to a decree for specific performance. The defendants have appealed.

On the 13th October, 1921, the first plaintiff's elder brother, Arumugam, the first plaintiff and his younger brother, the second plaintiff, for himself and his minor son, the fifth plaintiff mortgaged 58·59 acres of agricultural land to one Viswanatha Aiyar to secure a loan of Rs. 20,000 bearing interest at 10½ per cent. per annum. On the 12th March, 1929, the first plaintiff, as the manager of the family, created a second mortgage over the same properties in favour of the first mortgagee's brother Balasubramaniam to secure a loan of Rs. 5,000. Viswanatha Aiyar died in 1930 and the surviving members of the family became entitled to both the mortgages. On the 7th January, 1937, there was due under those mortgages the sum of Rs. 31,500. On that date the mortgagors sold to Balasubramaniam 32·17 acres of the mortgaged property in settlement of this claim. Two days later Balasubramaniam leased the 32·17 acres to the first plaintiff for a period of six years at an annual rental of Rs. 1,450. The first instalment of the rent was to be paid on the 30th April, 1938, and the subsequent instalments on the 30th April in each succeeding year. In default of payment of any instalment of rent by the due date the amount was to bear interest 12 per cent. per annum. On the same day Balasubramaniam agreed with the lessee that if he paid the rent regularly and paid Rs. 31,500 before the 30th April, 1943, he would reconey to him the 32.17 acres. It is this agreement which is made the basis of the claim for specific performance.

Balasubramaniam was joint with his younger brother Rangaswami. In 1938 they separated and to Rangaswami was assigned as part of his share in the family estate the 32.17 acres of land, subject to the lease and the agreement of the 9th January, 1937. Rangaswami died on the 12th October, 1942. The suit was brought against his daughters as his heirs. They are the appellants.

Clauses 2 and 3 of the agreement to re-sell are the important ones and they read as follows:

> "2. If this agreement does not stand cancelled under clause 3, *infra*, this agreement shall be in force only up to 30th April, 1943. Time is the essence of this agreement.
>
> 3. Should the said party No. 2 without making payment of the amount in full, be in arrears in respect of any instalment out of the 7 instalments of the lease amounts payable in each year on the 30th April of the respective year and of the lease amount alone payable by 30th September, 1937, on the succeeding due date, *i.e.*, by 30th April, 1938, or, should he be in arrears without wholly paying the sircar kist, etc., pertaining to the lands covered by the lease, which he himself has promised to pay for the lease period, *i.e.*, from fasli 1345 (1935-36) to fasli 1352 (1942-43) as mentioned in the lease deed, this sale agreement shall stand cancelled forthwith without reference to the subsequent due dates and furthermore, the aforesaid party No. 2 shall forfeit all the rights and reliefs belonging to the said party No. 2 under this agreement. Subject to the aforesaid conditions alone, we have entered into this agreement of sale, with mutual consent."

Only the first instalment of the rent payable under the lease was paid in time. On the 25th December, 1938, the lessee attorned to Rangaswami Aiyar and on that date the lessee paid the rent which fell due on the 30th April, 1938. Admittedly, this default was waived both in respect of the lease and of the agreement, but it was specifically provided that the waiver was to be without prejudice to subsequent defaults. The rent due on the 30th April, 1939, was not paid until the 12th December of that year and that due on the 30th April, 1940, not until the 22nd December, 1940. By the 20th July, 1942, the lessee had paid less the sum of Rs. 447, what was due in respect of the fifth and sixth instalments. It is the case for the plaintiffs that before the suit was filed they tendered the Rs. 31,500, and Rs. 1,450, the amount of the 7th and last instalment. We will assume this to be the case.

The learned Subordinate Judge held that the plaintiffs were entitled to a decree for specific performance of the agreement because they were prepared to pay the last instalment of the rent and had tendered the Rs. 31,500. The purchase consideration was in fact paid into Court. In these circumstances the learned Subordinate Judge was of the opinion that the lessor had waived all default and consequently the plaintiffs were entitled to enforce the agreement for re-sale. He overlooked, however, the fact that the terms of the lease and the terms of the agreement stood apart and that in accepting rent after the due date the lessor had not waived his rights under the agreement. On the 19th August, 1940, the lessor through his legal adviser wrote to the first plaintiff stating that the agreement for re-sale stood cancelled. On the 13th September, 1941, the lessor wrote to the first plaintiff a further letter in which the same position was maintained.

The fact that the lessor did not insist on the forfeiture of the lease did not affect the terms of the agreement to reconvey. The plaintiffs could only insist on a reconveyance by fulfilling the terms of the agreement. The case of *Bastin* v. *Bidwell*[1] is directly in point. There a lease of a house contained a covenant by the lessee to pay the rent and keep the premises in repair, and to paint the outside and inside at certain fixed periods. The lessor agreed that the lessee should be entitled, on giving six months' notice before the end of the term, to have a further lease for 21 years "upon paying the rent and performing and observing the covenants" in the lease. The lessee failed to fulfil his covenants and the lessor refused to grant a renewal of the lease. It was held by Kay, J., that the lessee's covenants constituted a condition precedent to his right to a renewal of the lease and that as he had not carried out what he had undertaken to do in respect of painting and repairs, he was not entitled to a renewal. The learned Judge based his decision on the judgment of Mellish, L.J., in *Finch* v. *Underwood*,[2] where it was argued that

1. (1881) 18 Ch.D. 238. 2. (1876) 2 Ch.D. 310.

where covenants in a lease had not been duly performed, but that the landlord had gone on receiving rent with full notice of the circumstances, there was waiver.

Kay, J., said :

"Lord Justice Mellish answered that argument in this way : 'Receipt of rent waives a forfeiture' (that is, of course, the right of re-entry under a power to re-enter), 'because it admits the lease to be subsisting, but does it follow from that that a condition precedent to granting a new lease is waived?' I confess upon consideration that satisfies my mind completely. Supposing there was a waiver of the right of re-entry, it does not seem to me at all to follow that the precedent condition would be waived or affected in the least degree. The condition precedent is this : If you have performed your covenants altogether, then, that being the precedent condition you shall be entitled to have the renewed lease ; if you have not performed your covenants it does not matter that the lessor may have waived his right of forfeiting the lease ; the condition precedent has not been performed, and if the precedent condition has not been performed, the right which depends upon it does not arise at all."

That is the position here. The lessor did not, as he had a right to do, forfeit the lease, but he made it quite clear that in accepting payment of rent after the due date he was still insisting on his right of ignoring the agreement for re-sale, because of the non-fulfilment of the conditions of that agreement. In the present case the plaintiffs are not entitled to specific performance because they have not fulfilled the conditions of the contract for re-sale.

The appeal is allowed and the suit dismissed with costs here and below.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE SHAHAB-UD-DIN.

Alluri China Venkata Suryanarayana Raju .. *Appellant**

v.

Nagumalli Venkata Subbiah and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 20, *Proviso*—"*Rejected*"—*Meaning.*

There is no reason why the word "rejected" in the proviso to section 20 of the Madras Agriculturists' Relief Act should be understood in the restricted sense in which it is used in Order 7, rule 11, Code of Civil Procedure and be taken to mean only rejected owing to some formal defect in the application. The word means rejection on any ground whatever including default of appearance of the petitioner On the rejection of the petition under section 19 of Act IV of 1938 the decree shall be executable as it stands.

Appeal against the order of the District Court of East Godavari at Rajahmundry, dated 8th September, 1942, and made in I.A. No. 228 of 1942 in O.S. No. 14 of 1935.

P. Satyanarayana Raju for Appellant.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal brought by the judgment-debtor under a decree passed in O. S. No. 14 of 1935 on the file of the District Court of East Godavari against an order refusing to scale down the decree under section 19 of the Madras Agriculturists' Relief Act, 1938.

The facts are briefly these : The decree was passed on 29th January, 1937, for Rs. 17,371. The appellant applied for stay of the decree under section 20 of the Act and stay was ordered on the 2nd April, 1938. Within sixty days of that order, he filed an application, I.A. No. 258 of 1938, under section 19 for scaling down the decree debt. After some evidence was taken in the matter, the petition was dismissed for default of appearance of the appellant on 31st August, 1939. An appeal against that order C.M.A. No. 270 of 1940 was dismissed as incompetent on 1st September, 1941, and an application to set aside the dismissal for default also proved unsuccessful, as it was held that Order 9, rule 9, Civil Procedure Code, did not apply to proceedings under Act IV of 1938. The appellant then filed another application I.A. No. 623 of 1939, under section 19 for the same relief and that was dismissed as having been filed out of time. Nothing daunted he filed the present applica-

---

* A. A. O. No. 626 of 1943. 4th September, 1945.

tion I. A. No. 228 of 1942, praying for the very same relief. The Court below dismissed it on two grounds, namely, (1) that it was barred by limitation and (2) that the previous order of dismissal of I. A. No. 258 of 1938 operated as *res judicata.* Against that order the present C.M.A. has been brought.

The question for determination turns on the true interpretation of the proviso to section 20 of the Act. The proviso says :

> "Where within 60 days after the application for stay has been granted the judgment-debtor does not apply to the Court which passed the decree for relief under section 19 or where an application has been so made, and is rejected, the decree shall be executed as it stands, notwithstanding anything contained in this Act to the contrary."

It is argued that the word ' rejected ' must be understood in the same sense in which it is used in Order 7, rule 11, Civil Procedure Code, and must be taken to mean rejected owing to some formal defect in the application. We see no reason why the word should be understood in that restricted sense in the proviso. ' Rejected ' is a plain English word and must signify rejection on any ground whatever including default of appearance of the petitioner. If the word is thus understood in its ordinary sense, the proviso clearly bars the application made by the appellant in the Court below, for it enacts that the decree shall then be executed as it stands. In this view, it is unnecessary to consider the question whether the previous order of dismissal of I. A. No. 258 of 1938 operates as *res judicata* ; for even if it does not, the present application, having been filed long after the expiry of 60 days from the order granting stay, is clearly barred by limitation under the proviso.

The appeal is therefore dismissed with costs.

K.S. ——— *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE LAKSHMANA RAO AND MR. JUSTICE RAJAMANNAR.

Myneni Pundarikakshayya .. *Appellant**

v.

Kondamudi Sreeramulu .. *Respondent.*

*Hindu Law—Minor—*De facto *guardian—Powers of—Cannot execute promissory note in the name of the minor even in respect of borrowings for necessary purposes so as to bind minor's estate—Sale of minor's property in discharge of debt due on such promissory notes—Nullity—Such promissory note cannot operate as acknowledgment of antecedent debts so as to save limitation.*

A *de facto* guardian of a Hindu minor cannot bind the minor's estate by a promissory note executed by him in the minor's name even in respect of money borrowed for necessary purposes.

A sale by the natural father as *de facto* guardian of a minor (who has been given away in adoption) in discharge of a promissory note executed by that guardian to discharge a still earlier debt binding on the minor on a promissory note executed by the minor's adoptive father could not convey a valid title as the discharge of a promissory note which the *de facto* guardian had no power to execute cannot be a valid consideration.

Nor can the *de facto* guardian by executing the promissory note extend the period of limitation in respect of the antecedent debts of the minor's deceased adoptive father. Such debts being barred by limitation cannot provide any consideration for the sale.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla, in O. S. No. 49 of 1942.

P. Satyanarayana Rao for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *K. Kotayya* and *V. G. Krishnamurthi* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—The main question in this appeal is whether a person, who without lawful authority takes upon himself the management of the estate of a Hindu minor, can in law execute a promissory note in the name of the minor

---

* Appeal No. 81 of 1944. 21st August, 1945.

in respect of money borrowed for a necessary purpose and thereby bind the minor's estate. The person who without lawful authority takes charge of a minor's estate is commonly referred to as the *de facto* guardian and it will be convenient to use the expression in this judgment.

The appellant is the adopted son of one Chelamaiya Chowdri, who died on the 9th January, 1925. Chelamaiya Chowdri was survived by two widows and by his will dated the 20th November, 1924, he gave the junior widow, Sri Krishnamma, power to adopt a son to him. She exercised the power in favour of the plaintiff soon after the testator's death. The validity of the adoption is not in question. Sri Krishnamma died in the month of November 1928 and after her death the plaintiff's natural father, China Seshayya, entered upon the management of his estate. In *Chennappa* v. *Onkarappa*[1], a Full Bench of this Court held that the Hindu law only recognises the father or the mother of a minor as his lawful guardian and that when both of them are dead there can be no *de jure* guardian without an order of the Court. China Seshayya had not been appointed the plaintiff's guardian by an order of Court and therefore he had no authority to manage the minor's estate.

On the 1st February, 1923, Chelamaiya Chowdri borrowed Rs. 3,000 from the defendant, who was his pleader. On the 23rd April, 1925, Sri Krishnamma, then the *de jure* guardian of the minor, renewed this promissory note. With interest the debt had by that time amounted to Rs. 3,802. On the same date she executed another promissory note in the name of the minor in respect of a further loan of Rs. 1,200. On the 23rd April, 1928, Sri Krishnamma executed a promissory note for Rs. 6,802-11-6 in renewal of the two promissory notes of the 23rd April, 1925. On the 22nd June, 1931, China Seshayya, the *de facto* guardian, purported to renew that promissory note. The debt then amounted to Rs. 9,251-11-6. It will be observed that this promissory note was executed more than three years after the date on which the *de jure* guardian had signed the last promissory note. The explanation of this is that the period of limitation expired during the Court vacation and the payee had the right of instituting a suit on the re-opening of the Court. The new promissory note was executed on that day in order to avoid a suit being filed.

On the 1st September, 1919, Chelamaiya Chowdri executed a promissory note in favour of one Gutta Punniah for Rs. 4,082-9-6. Chelamaiya Chowdri renewed this promissory note on the 27th August, 1922, by the execution of a fresh note. On the 12th July, 1925, and on the 8th July, 1928, Sri Krishnamma executed promissory notes in acknowledgment of the debt. On the 12th November, 1928, the *de facto* guardian purported to renew the promissory note of the 12th July, 1925, and on the 11th November, 1931, he signed a fresh promissory note in the minor's name for Rs. 9,497-14-9 as a renewal of the promissory note of the 12th November, 1928.

On the 2nd June, 1932, the *de facto* guardian conveyed the immoveable properties in suit to the defendant for the sum of Rs. 14,873. Only Rs. 75 was paid in cash and this sum represented the cost of the stamp on the conveyance and the registration charges. The rest of the consideration was supposed to be satisfied by the discharge of the promissory note which the *de facto* guardian had executed in favour of the defendant on the 22nd June, 1931, the amount of the debt then being Rs. 10,207-6-6, and the payment of Rs. 4,590-9-6 to Gutta Punniah in part discharge of the promissory note which the *de facto* guardian had executed in his favour on the 11th November, 1931.

On the 9th December, 1937, the plaintiff attained his majority and on the 9th December, 1940, he instituted this suit. He averred that his natural father had no power to renew the promissory notes executed by Sri Krishnamma and no power to convey the properties in suit in discharge of these debts. The learned Subordinate Judge held that as the original debts were binding on the minor's

1. (1939) 2 M.L.J. 884: I.L.R. (1940) Mad. 358 (F.B.).

estate, the *de facto* guardian had power to renew the promissory notes in order to avoid the creditors instituting suits against the estate. Consequently the Subordinate Judge dismissed the suit. He rejected a plea advanced by the defendant that the plaintiff had ratified the action of the *de facto* guardian in conveying the properties to him. The plaintiff contends that the Subordinate Judge erred in dismissing the suit. The defendant relies on the reasons given by the Subordinate Judge for the dismissal but says that he erred in rejecting the plea of ratification. The defendant further says that in any event he is entitled to a charge on the properties in respect of the Rs. 4,590-9-6, which he paid to Gutta Punniah. There were other questions raised in the trial Court but it is not necessary to consider them, because Mr. Satyanarayana Rao, on behalf of the plaintiff, has for purposes of the appeal conceded that the promissory notes executed by Chelamaiya Chowdri were executed for full consideration and that the debts were binding on the estate up to three years after the last renewals by Sri Krishnamma. He also conceded that the *de facto* guardian had administered the estate to the best of his ability.

We will now proceed to examine the reported cases which have bearing on the powers of a *de facto* guardian of a Hindu minor. In *Hunooman Persaud's case*[1], which was decided in 1856, the Privy Council observed that under the Hindu law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly for the purpose of saving the estate or for the benefit of the estate is not, provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager, affected by the want of union of the *de facto* with the *de jure* title. Since that judgment the Courts in India have consistently held that a *de facto* guardian can not only charge, but sell immoveable property belonging to a minor's estate when such action is required in the interests of the minor. It is true that in *Ramaswami Pillai* v. *Kasinatha Aiyar*[2], Kumaraswami Sastri and Curgenven, JJ., said that, were the matter *res integra*, they would be inclined to hold that a *de facto* guardian had no power to convey a right or interest in immoveable property which the transferee could enforce against the minor and would have applied the same principles laid down by the Privy Council in *Mata Din* v. *Ahmed Ali*[3] and *Imambandi* v. *Mutsaddi*[4], which were decisions under the Muhammadan law. The matter, however, was not *res integra* and therefore it was too late in the day to reopen the question.

In *Ramajogayya* v. *Jagannadhan*[5], Ayling and Seshagiri Aiyar, JJ. (Wallis, C. J., dissenting) held that no decree could be passed against a minor or his estate on a contract entered into on his behalf by his guardian under which covenant no charge was created on the estate, except in cases in which the minor's estate would be liable for the obligation incurred by the guardian under the personal law to which he was subject. Put in other words, the guardian could covenant on behalf of the minor so as to make his estate liable without creating any charge on the estate, provided that the money borrowed by the guadian was for a necessary purpose. The rule laid down by the Privy Council in *Waghela Rajsanji* v. *Shekh Masluddin*[6], that a Hindu guardian cannot contract in the name of the ward so as to impose on him a personal liability was not, in the opinion of Ayling and Seshagiri Aiyar, JJ., intended to affect the Hindu law liability of the minor. Wallis, C.J., was of the opinion that a decree could not be passed against a minor on his attaining his majority or against his estate on a covenant entered into in his behalf by a guardian for his benefit. In that case the contract had been entered into by a *de jure* guardian.

The majority opinion in *Ramajogayya* v. *Jagannadhan*[5] has since prevailed in this Presidency and it can now be regarded as settled law that a *de jure* guardian

1. (1856) 6 M.I.A. 393.
2. (1927) M.W.N. 356 : A.I.R. 1928 Mad. 226.
3. (1912) 23 M.L.J. 6 : L.R. 39 I.A. 49 : I.L.R. 34 All. 213 (P.C.).
4. (1918) 35 M.L.J. 422 : L.R. 45 I.A. 73 : I.L.R. 45 Cal. 878 (P.C.).
5. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
6. (1887) L.R. 14 I.A. 89 : I.L.R. 11 Bom. 551 (P.C.).

can borrow money on behalf of the minor for a necessary purpose without expressly charging the estate and by the contract make the estate liable for the payment of the debt. The only case in which this principle has been applied by this Court where the contract was made by a *de facto* guardian is *Sudarsana Rao* v. *Dalayya*[1]. There a boy had been adopted by a Hindu widow to her deceased husband under a power given to her whereupon the boy's natural father without any order of Court entered upon the management of his estate. While so acting the *de facto* guardian entered into an agreement with the adoptive father's mother with regard to the amount to be paid to her for maintenance and it was held that the agreement was binding on the minor's estate, as under his personal law he was bound to maintain her out of the estate. The learned Judges did not discuss the question whether the powers of a *de facto* guardian differ in this respect from those of a *de jure* guardian. We will assume that a *de facto* guardian can enter into such a contract and thereby bind the minor's estate. It is quite another thing, however, to say that a *de facto* guardian can bind the estate by executing a promissory note in the name of the minor.

Admittedly in no circumstances can a *de facto* guardian make the minor personally liable. Even a *de jure* guardian cannot do this, but it has been recognised that a *de jure* guardian can, where there is necessity, make the minor's *estate* liable in respect of the debt evidenced by a promissory note executed by him and that by such an instrument he can extend the period of limitation, because he is in law the agent of the minor. There have been cases in which a suit has been filed against the minor's estate on the instrument itself, but this is wrong. The minor's estate can only be made liable on the debt. An example of this is to be found in *Krishna Chettiar* v. *Nagamani Ammal*[2], although it would appear that in that case there was a paragraph in the plaint referring to the binding character of the debt. Where the suit is merely on a promissory note a decree should not be passed without the plaint being amended. It has been suggested that there is an observation to the contrary in *Seetharamayya Garu* v. *Sathiah*[3], because it was there said that the guardian of a Hindu minor could bind a minor in respect of a promissory note in proper circumstances. I delivered the judgment in that case and all that the Court intended to imply was that a minor's estate could be bound by the debt evidenced by the promissory note, not that the estate could be sued on the instrument.

The position was very aptly stated by Krishnaswami Aiyangar, J., in delivering the judgment in *Annamalai* v. *Muthuswami*[4], when he said :

> "It is necessary to sound a note of caution against the error of thinking that the promissory note evidences a contract binding on the minor by force of the instrument itself. The liability does not arise on the instrument, but on the debt evidenced by it, and is enforced against the estate, not on account of the fiction that the contract of the guardian is the contract of the minor, but on account of the substantive principle of the personal law of the minor which creates the liability. It is scarcely necessary to add that the liability of the estate, though personal in the English law sense of the word, is not personal in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of the minor's estate only."

In *Swaminatha Odayar* v. *Natesa Iyer*[5], a Bench of this Court (Reilly and Cornish, JJ.) held that a guardian of a minor could not impose a liability upon the minor by executing a promissory note on his behalf, even for a necessary purpose, and a distinction was drawn between the liability arising from an ordinary debt and that arising from a debt secured by a negotiable instrument. There, as here, the instrument had been executed by the natural father of a boy who had been adopted. The judgment in that case was overruled by the Full Bench which decided *Satyanarayana* v. *Mallayya*[6], but on another point. The Full Bench apparently approved of the view expressed in *Swaminatha Odayar* v. *Natesa Iyer*[5] that a *de facto* guardian cannot in law sign a promissory note on behalf of the minor.

1. (1943) 1 M.L.J. 339 : I.L.R. (1944) Mad. 218.
2. (1915) 28 M.L.J. 216 : I.L.R. 39 Mad. 915.
3. (1938) M.W.N. 677.
4. (1939) 1 M.L.J. 792 : I.L.R. (1939) Mad. 891.
5. (1932) 56 M.L.J. 350 : I.L.R. 56 Mad. 879.
6. (1935) 68 M.L.J. 540 : I.L.R. 58 Mad. 735 (F.B.).

In *Vembu Aiyar* v. *Subbiah Pillai*[1], Kuppuswami Ayyar, J., sitting alone, held that a minor was not bound by an indorsement of payment made by his *de facto* guardian on a promissory note which the *de facto* guardian purported to execute in the minor's name. A Bench of the Bombay High Court in *Nagindas Gokuldas* v. *Bhimrao Damu*[2] also expressed the opinion that a promissory note executed by a *de facto* guardian on behalf of a minor even for a necessary purpose cannot bind the estate of the minor.

We are of the opinion that the cases in which it has been held that a *de facto* guardian cannot bind the minor's estate by a promissory note executed by him in the minor's name have been rightly decided. He could only bind the minor by such an instrument if the personal law of the minor allowed him to do so. The ancient texts do not, of course, contemplate such a situation and it is not suggested that authority has been conferred by custom. It is one thing for a *de facto* guardian to borrow money for a necessary purpose and quite another thing to sign a negotiable instrument on the minor's behalf. There is nothing in the judgment in the *Hanooman Persaud's case*[3] or in any later case to support such a proposition. On the other hand, as we have shown, there are decisions directly to the contrary. A power to borrow does not in itself imply a power to execute a negotiable instrument in respect of the debt.

In *Chennappa* v. *Onkarappa*[4] a Full Bench of this Court held that a *de facto* guardian is not the lawful guardian within the meaning of section 21 of the Indian Limitation Act, 1908, and therefore is not an agent duly authorised to sign an acknowledgment of liability. There is here direct authority for the statement that the promissory notes which the natural father of the plaintiff signed could not operate to extend the period of limitation, which means that when the conveyance was executed by the *de facto* guardian in favour of the defendant there were no debts binding on the minor's estate.

The learned Advocate-General has suggested that the promissory note signed by the *de facto* guardian operated to create fresh obligations; in other words, they evidenced fresh debts. The debts were not fresh debts. They remained the old debts and the *de facto* guardian could not continue them beyond the period of limitation by merely signing fresh promissory notes in the minor's name. The learned Advocate-General has also suggested that the consideration for the sale deed was the abstention from suing. This argument is equally fallacious. The deed itself shows that the consideration, except for the Rs. 75 paid for the stamp and the registration charges, was the discharge of one of the promissory notes executed by the *de facto* guardian and the partial discharge of another promissory note executed by him.

We hold that the minor's natural father had no authority in law to execute promissory notes on behalf of the minor and therefore there was no consideration for the conveyance to the defendant. We also hold that the *de facto* guardian could not extend the period of limitation in respect of the debts contracted by the adoptive father and consequently those debts were barred at the time of the conveyance. From whichever way the matter is viewed the conveyance cannot bind the minor.

Before we pass on to the question of ratification we must refer to another argument advanced by Mr. Satyanarayana Rao on behalf of the plaintiff. It was based on the judgment of the Privy Council in *Partap Singh* v. *Sant Kuar*[5]. In that case it was held that a Hindu minor was not bound by an agreement entered into by a *de facto* guardian and it was suggested by Mr. Satyanarayana Rao that the rule applied in all cases, even where the contract was for a necessary purpose. Their Lordships were not considering a case where a *de facto* guardian had entered into a contract for a necessary purpose within the meaning of *Hanooman Persaud's case*[3]. The contract in *Partap Singh* v. *Sant Kuar*[5] had no reference to such a situation and therefore the decision of their Lordships has no bearing on the present case.

1. (1943) 1 M.L.J. 85.
2. I.L.R. (1943) Bom. 117.
3. (1856) 6 M.I.A. 393.
4. (1939) 2 M.L.J. 884 : I.L.R. (1940) Mad. 358 (F.B.).
5. I.L.R. (1938) Lah. 313.

The issue with regard to ratification was decided against the defendant by the Subordinate Judge without discussion, but we agree with his conclusion. Gutta Punniah had obtained a decree against the estate in respect of moneys which he had advanced to the adoptive father. The plaintiff then applied for the scaling down of the decretal debt under the provisions of the Madras Agriculturists' Relief Act. The sum of Rs. 4,580-9-6 had been paid by the defendant to him before that suit was filed and in the plaintiff's application for scaling down he had to mention this payment. It is said that this amounted to ratification of the conveyance. Obviously it could not. As a decree had been passed against the plaintiff in favour of Gutta Punniah the plaintiff was entitled to escape with the minimum payment allowed by the law of the land. Moreover the validity of the conveyance to the defendant was not in question in that case.

The defendant is on firm ground in asking that he be given a charge over the properties in suit in respect of the Rs. 4,590-9-6, which he paid to Gutta Punniah. Mr. Satyanarayana Rao has in fact accepted the justice of this claim. The defendant will be granted a charge on the properties in suit for this amount with interest at six per cent. per annum from the date of payment to Gutta Punniah. The correctness of a finding by the Subordinate Judge that the mesne profits amounted to Rs. 1,000 per annum has not been disputed. The plaintiff is entitled to mesne profits at this rate from the year 1932.

The appeal is allowed and a decree for possession granted subject to the charge on the properties in favour of the defendant in respect of the Rs. 4,590-9-6 with interest. The plaintiff will be paid mesne profits at the rate of Rs. 1,000 per annum until possession is given. The plaintiff will have two-thirds of his costs in the trial Court and in this Court.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Sivapuram Sri Sivagurunathaswami Koil by trustees, Sethu Chettiar and another .. *Appellants**

v.

Sarangapani Ayyangar and another .. *Respondents.*

Madras Estates Land Act (I of 1908), *section* 3 (16)—Padugai *land—If "ryoti land"—Suit to recover possession of such land from purchaser of crops only on such land from lessee—Maintainability in Civil Court.*

Whether or not *padugai* land is "ryoti land" within the meaning of the term as defined in the Madras Estates Land Act, such land though it may not be part of the river bed, may be part of the river bank in which case also as in the case of river beds the land would not be comprised within the definition of "ryoti land."

In a suit against the lessee and a purchaser from him of the crops only on such land, for the recovery of the land, it is not open to the purchaser from the lessee to contend that the suit does not lie in a Civil Court but that it must be filed only in a Revenue Court. The fact that the purchaser was under an obligation to pay the rent for the remaining years of the term of the lease, cannot convert his status into one of a ryot. He is only entitled to enjoy the crops on the land. Such a person cannot be described as one who holds the land for the purpose of agriculture.

In the circumstances the Civil Court had jurisdiction to entertain the suit.

Appeal against the order of the Court of the Subordinate Judge of Kumbakonam, dated 31st January, 1944 and made in A.S. No. 73 of 1943 (O.S. No. 8 of 1942, D. M. C., Kumbakonam).

K. S. Champakesa Aiyangar and *K. Venugopala Aiyangar* for Appellants.

S. V. Narayana Aiyar and *K. Venkataramani* for Respondents.

The Court delivered the following

JUDGMENT.—Plaintiffs have preferred this appeal from an order directing their plaint to be presented to the revenue Court on the ground that one or other

* A. A. O. No. 429 of 1944. 4th September, 1945.

of the two defendants is a ryot with occupancy rights in the land for the recovery of which the suit has been brought and that the Civil Courts have therefore no jurisdiction to try this suit. The first defendant took the land on lease from the temple trustees under the lease deed Ex. P-1 dated 2nd April, 1934 for a period of five years. It is unnecessary to decide whether padugai land, which means according to the observations contained in *Secretary of State for India* v. *Raghunatha Thathachariar*,[1] land on the lower-level bank breadth of the river between the edge of the sandy stream bed and the high flood-level bank is 'ryoti' land within the meaning of the Madras Estates Land Act. Even though it may not be part of the river bed it may be part of the river bank in which case also, as in the case of river beds, the land would not be comprised within the definition of ryoti land. But the point need not be pursued further as the first defendant remained *ex parte* in the Munsiff's Court and has stated here through his learned Advocate that he does not propose as against the plaintiffs (appellants) to raise any such contention, as it would mean that he would be acting contrary to the terms of the lease deed under which he undertook to surrender the property at the end of the term.

So far as the second defendant is concerned, I am clearly of the opinion that he cannot be called a ryot within the meaning of the Act. His rights are derived from the sale deed Ex. D-1 executed in his favour by the first defendant on 22nd January, 1936. He is a purchaser only of the plantain crops then standing on the land for a sum of Rs. 268. In more than one place the sale deed makes it clear that his right was only to the crops and nothing more. After stating that the second defendant was to hold and enjoy the crops standing on the land absolutely with powers of alienation and that possession has been delivered of those crops, the deed describes the property sold in the schedule as only the plantain crops standing on R. S. No. 3492. It is true that the second defendant was asked to pay the rent for the remaining two years of the term to the temple; but this obligation cannot convert the status of the second defendant into one of a ryot. He was to take and enjoy the crops on the land and was not entitled to anything more. Such a person cannot be described as one who holds the land for the purpose of agriculture.

I hold that the Civil Court has jurisdiction to entertain this suit and direct that the plaint be re-presented to the Court of the first instance so that the suit may be disposed of in accordance with law and in the light of the foregoing observations. Costs will abide the result.

No leave.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR JUSTICE HORWILL.

Valia Anjuthathi Thamburatti .. *Appellant**

v.

Kalathingal Umachakutty Umma and others .. *Respondents.*

Malabar Compensation for Tenants Improvements Act (I of 1900), sections 5 and 6—Tenants sub-leasing—Damage caused by sub-tenants—Claim for compensation for improvements by sub-tenant—Set off how far permissible—Balance remaining in favour of landlord—Right to get decree for it—'Melcharth'—Existence of—How far landlord deprived of his right to sue for ejectment.

Although the Malabar Compensation for Tenants Improvements Act makes provisions for payments for improvements to be made direct to the sub-tenants, the Act does not purport to displace the ordinary relations between landlord and tenant. If, therefore, sub-tenants commit any act of waste, the tenant is liable to the landlord for acts done by his sub-tenants in the absence of a contract between the landlord and the sub-tenants. The Act does, however, permit the landlord to set off against the compensation payable to a sub-tenant any sum that may be due by way of rent and damages on the land held by that sub-tenant. This right to set off seems to carry with it a corresponding obligation to set off against the value of improvements due to a sub-tenant the amount of damages committed by that sub-tenant. Only if the value of the improvements is insufficient to compensate the landlord for damages done, would the landlord be able to have recourse against the tenant for damages committed by his sub-tenant.

1. (1912) 24 M.L.J. 31: I.L.R. 38 Mad. 108.

* S. A. No. 1033 of 1944. 9th August, 1945.

The sub-tenants cut down trees and so entitled the landlord, according to the terms of the lease, to demand certain sums for those trees. The landlord sued for ejectment and for rent. The claim became one for rent and for the value of the trees. The tenants by virtue of sections 5 and 6 of the Malabar Compensation for Tenants Improvements Act being entitled to compensation for improvements and to a set off, the landlord had to receive upon eviction, the difference between the rent and the improvement. But the lower Court refused the landlord the decree against his tenants for damages committed by the sub-tenants.

On appeal, *held*, that the landlord will as far as possible set off the value of damages committed by each sub-tenant against the compensation for improvements due to that particular sub-tenant. Only in the event of his being unable to recover from the value of improvements, the amount of damages committed by the sub-tenant, will the landlord be entitled to proceed against the tenant.

Held further, that by the granting of a 'melcharth' the landlord will not lose his right to protect his interests. Hence he can himself bring a suit for ejectment.

Mammu v. *Sevina*, (1940) 51 L.W. 569 and *Virupakshan* v. *Chembu Nayar*, (1937) 1 M.L.J. 83 : I.L.R. (1937) Mad. 545, (F.B.) referred to.

Appeal against the decree of the District Court of South Malabar in A. S. No. 216 of 1943, preferred against the decree of the Court of the District Munsiff of Calicut in O. S. No. 407 of 1942.

K. P. Ramakrishna Aiyar for Appellant.

S. R. Subramanyam for 1st Respondent.

The Court delivered the following

JUDGMENT.—The suit out of which this second appeal arises was one in ejectment and for rent. The lessees were defendants 1 and 2 but they sub-leased the land to other defendants, who cut down trees and so entitled the landlord, according to the terms of the lease, to demand certain sums for those trees. So the claim became one for rent and for the value of the trees cut. Against that claim, the tenants, under section 5 of the Malabar Compensation for Tenants' Improvements Act, are entitled to improvements. Section 6 permits of a set off being made, the landlord, upon eviction, receiving the difference between the rent and the improvements.

The trial Court found that a number of trees had been cut; and the Commissioner valued those trees. It permitted the plaintiff to set off the total damages against the total improvements; but the lower appellate Court held that the persons who committed the damage were solely responsible for the acts committed by them, and so, while it permitted the plaintiff to set off against the improvements to be given to those particular sub-tenants the value of the damages committed by them, it refused to give the plaintiff a decree against his tenants, defendants 1 and 2, for the damages committed by sub-tenants. It is against this modification of the decree that the arguments in appeal have been directed.

The second defendant has filed a Memorandum of Cross-objections in which he contends that the plaintiff was not entitled to bring a suit at all; because he had granted a melcharth to the 24th defendant, who alone was entitled to bring a suit. The 2nd defendant has also questioned the scale on which damages were awarded.

Although the Malabar Compensation for Tenants' Improvements Act makes provision for payments for improvements to be made direct to the sub-tenants, the Act does not purport to displace the ordinary relations between landlord and tenant. If, therefore, sub-tenants commit any act of waste, the tenant is liable to the landlord for the acts done by his sub-tenants in the absence of any contract between the landlord and the sub-tenants. The Act does, however, permit the landlord to set off against the compensation payable to a sub-tenant any sum that may be due by way of rent and damages on the land held by that sub-tenant. This right to set off seems to carry with it a corresponding obligation to set off against the value of improvements due to a sub-tenant the amount of damages committed by that sub-tenant. Only if the value of the improvements is insufficient to compensate the landlord for damages done, would the landlord be able to have recourse against his tenant for the damages committed by his sub-tenant.

It is argued by the learned advocate for the respondent that the Court can and should grant relief against harsh terms in the lease deed whereby excessive amounts are claimed by a landlord for trees cut by tenants. I do not however find that

in the lower appellate Court the respondent contended that the rate of damages awarded for the trees cut was excessive. He denied that any damage was caused, and contended that if damage had been done, it should be paid for by the sub-tenants concerned. He did not say that the rates fixed in his lease-deed were excessive and should be relieved against by the Court.

The second appeal is allowed to the extent indicated above, *i.e.*, the landlord will, as far as possible, set off the value of the damage committed by each sub-tenant against the compensation for improvements due to that particular sub-tenant. Only in the event of his being unable to recover from the value of the improvements the amount of the damages committed by that sub-tenant, will the landlord be entitled to proceed against the tenant; and then only for the difference between the values of the damage committed and of the improvements made by that sub-tenant. The tenant will of course, in his turn, be entitled to recover in execution any sum paid by him to the plaintiff on account of the damage committed by that sub-tenant.

When a melcharth is granted, the melcharthdar is authorised by the deed to take action against the tenants and to obtain possession of the land upon redemption. It is argued that since that is so, the jenmi loses his right to bring a suit in ejectment and for redemption of kudikanam. A "melcharth" is defined in the Malabar Tenancy Act as "the transfer by the landlord of part of his interest in any land held by his tenant by which the transferee is entitled to evict such tenant." This definition does not suggest that by the granting of a melcharth, the landlord has no right to protect his interests; and it would be strange if the granting of a melcharth had this effect. In *Virupakshan* v. *Chembu Nayar*[1] a case decided by a Full Bench of this Court, it was assumed that a jenmi did not ordinarily lose his right to proceed against his tenant by the granting of a melcharth, the learned Judges having there to consider whether on account of some special circumstance there existing, the landlord had lost the rights he would otherwise have retained. A somewhat similar question to that discussed here arose in *Mammu* v. *Seyina*[2] in which the learned Judge was not prepared to accept the contention that the landlord had lost all rights to protect his interest by the granting of a melcharth. In that case, the melcharthdar had brought a suit and obtained a decree, but had failed to execute it. That case is sought to be distinguished on the ground that in this case the melcharthdar had done his duty with regard to certain lands which were the subject of the melcharth and that the melcharth was therefore acted upon. The melcharth was however acted upon in the case considered by Stodart, J., in *Mammu* v. *Seyina*[2]; for the melcharthdar had actually brought a suit and obtained a decree. I see no reason to think that by the execution of a melcharth the plaintiff lost his right to protect his interest. Before filing his present suit, he wrote to the melcharthdar, who said that as he had been unable to evict the tenants he was willing for the plaintiff to bring the present suit. The melcharthdar was impleaded as the 24th defendant. In the appeal both parties will bear their own costs. The Memorandum of Cross-objections is dismissed with costs.

K.C. —————— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Boggavarappu Satyanarayanamurthy .. *Appellant**

v.

Gontla Venkata Pichaiah and others .. *Respondents.*

Practice—Suit for specific performance of agreement to execute mortgage to secure moneys lent—Mortgage decree—If can be passed along with decree for specific performance.

1. (1937) 1 M.L.J. 83: I.L.R. (1937) Mad. 545 (F.B.)
2. (1940) 51 L.W. 569.

*Appeal No. 143 of 1944. 21st August, 1945.

In decreeing a suit for specific performance of an agreement by defendants to execute in the plaintiff's favour a mortgage of immoveable properties to secure moneys lent to them, it is not proper to pass a mortgage decree.

Observations of Sundara Ayyar, J., in *Narayana Kutti Goundan* v. *Pechiammal*, (1911) 22 M.L.J. 364 : I.L.R. 36 Mad. 426 at 434, held to be *obiter* and not followed.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada dated 16th September, 1943, and passed in O. S. No. 1 of 1941.

P. Satyanarayana Rao for Appellant.

Respondents not represented.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant sued the respondents in the Court of the Subordinate Judge of Bezwada for specific performance of an agreement which they had entered into with him to execute in his favour a mortgage of immoveable properties to secure moneys lent by him to them. The Subordinate Judge granted a decree for specific performance, but he reduced the agreed rate of interest, namely, compound interest at 12 3/8 per cent. with half-yearly rests to 8 per cent. simple interest. He refused to give the plaintiff a mortgage decree in this suit. The appellant has appealed both with regard to the reduction of interest and the refusal of the Subordinate Judge to grant him a mortgage decree. The respondents have not appeared.

The reason given by the Subordinate Judge for reducing the rate of interest which he regarded as "unconscionable and penal" was that the plaintiff was a very rich man and the defendants were poor, which according to him meant that he was in a position to dominate them. We do not regard compound interest at 12 3/8 per cent. to be unconscionable even with half yearly rests, but Mr. Satyanarayana Rao on behalf of the plaintiff has agreed to take simple interest at 12 3/8 per cent. The decree of the lower Court will be amended accordingly.

There is no substance in the plaintiff's contention that he should have a mortgage decree in this suit. It is based on an observation of Sundara Aiyar, J., sitting with Spencer, J., in *Narayana Kutti Goundan* v. *Pechiammal*[1], when he said :

"It appears to me that the important distinction between the English and Indian law pointed out above was overlooked in these cases. No doubt a person having an agreement may sue for the specific performance of the agreement to execute or assign a mortgage, and in suits for the execution of a mortgage deed, the Courts have sometimes passed not only a decree for specific performance but for sale also following on the execution of the conveyance."

The learned Judge did not mention any suits in which such a decree had been passed and from the subsequent remarks he was apparently referring to American law. The observations are admittedly *obiter* and they are not binding on us. We may add that we do not consider it proper to pass a mortgage decree in a suit for specific performance like the present one.

The decree of the trial Court will stand except as regards the rate of interest. As the respondents have not appeared we make no order as to costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Sinna Subba Goundan .. *Appellant**

v.

M. Rangai Goundan and others .. *Respondents.*

Res Judicata—*Provincial Insolvency Act (V of* 1920), *section* 4—*Hindu father declared insolvent—Purchaser from Official Receiver obstructed by the sons—Application for delivery of possession after removal of obstruction—Decision by Court that the properties were self acquired and sons referred to separate suit to establish rights if any—Decision binding—Title to the property cannot be reagitated.*

A Hindu father was declared insolvent and the purchaser of certain of his properties from the Official Receiver who was obstructed by the sons of the insolvent applied to the Court for delivery

1. (1911) 22 M.L.J. 364 : I.L.R. 36 Mad. 426 at 434.

* S. A. No. 1268 of 1944. 19th July, 1945.

of possession after removal of obstruction. The Court ordered the same after deciding that the properties constituted the self acquisition of the father and that the sons had no rights and that even if they had such rights they should be established by a separate suit. One of the sons having filed the suit,

Held, that the prior decision by the Subordinate Judge that the properties were self-acquired which was confirmed in appeal and revision was binding upon the sons and they cannot reagitate the matter. That decision cannot be attributed to any other jurisdiction than the one conferred on the insolvency Court by section 4 of the Provincial Insolvency Act. A decision under that section is final and conclusive. A mere direction of the Court that another proceeding might be taken for having a point more adequately considered and decided is of no avail when considering a plea of *res judicata.*

Appeal against the decree of the Court of the District Judge of Coimbatore in A. S. No. 268 of 1943, preferred against the decree of the Court of the District Munsiff, Coimbatore, in O. S. No. 1239 of 1941.

V. C. Veeraraghavan for Appellant.

T. K. Subramania Pillai for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant in this second appeal. He filed a suit for partition and for possession of his half share in the properties after setting aside certain alienations. The first defendant is his father who was adjudicated an insolvent on 25th June, 1935. The Official Receiver, Coimbatore, is the second defendant. The sixth defendant is the plaintiff's brother. The fourth defendant claims the properties comprised in this second appeal, which are described in item 1 of the B schedule, under a purchase by him from the Official Receiver on 18th December, 1935. The plaintiff states that the property is joint family property belonging to him and the father and that he is entitled to a half share therein, and that the Official Receiver could not sell his half share to the fourth defendant. The District Munsiff accepted his claim and gave him a decree for a one-third share as there were two other co-parceners, namely, the father and the sixth defendant. On appeal by the fourth defendant, the learned District Judge of Coimbatore dismissed the plaintiff's suit holding that the property was not joint family property but was the self-acquisition of the father, that the plaintiff's title was adjudicated upon and finally decided against him in the proceedings that took place in the insolvency of the father and that the suit should have been brought within one year from the date of the order of the High Court dismissing the plaintiff's civil revision petition against the order made against him in the insolvency proceedings.

No attempt has been made on the side of the respondent to support the view that the suit is barred by limitation under Art. 11 (A) of the Limitation Act.

The conclusion of the learned District Judge, differing in this respect from what the District Munsiff found, that the property could not be held to be joint family property is based on reasoning which cannot be accepted, as it is mostly speculative in nature. The first defendant, who was the father, was in possession of a number of items of properties which were dealt with as joint family properties in a partition between him and the plaintiff on the one hand and Periya Subbaya Goundan, a son by a pre-deceased wife on the other. The partition deed is Ex. P (1) dated 3rd August, 1928. Half of the suit property had been purchased by the father under Ex. D-14 on 27th November, 1927. There was a sale deed in his favour and another Marudachala. The other half was bought by the father under Ex. D-16 on 30th January, 1929. The half share that was purchased prior to the partiton deed is dealt with as joint family property in the partition deed and is allotted to the share of the father and the present plaintiff. The fact that Periya Subbayya Goundan stated on the previous occasion when he was examined in the insolvency proceedings that he did not get any share in the property is of no significance whatever; nor is the circumstance that the father borrowed money for purchasing this property either in 1927 or 1929. He was apparently the managing member of the family and an acquisition by him of property when he occupied that position with the aid of borrowed moneys cannot be said to be a self acquisition straightaway without any further proof or material. These, however, are circum-

stances on which the learned Judge has relied for his conclusion that the property is the self acquired property of the father and not joint family property as contended by the plaintiff. Whether the acquisition under Ex. D-16 of the other half share, which was after the date of the partition, would stand on a different footing is another matter.

When the purchaser from the Official Receiver sought to take possession he was obstructed by the sons. He applied to the Court in I. A. No. 70 of 1936, in I.P. No. 308 of 1934 for delivery of possession after removal of the obstruction. The application purported to be under section 5 of the Provincial Inslovency Act, and Order 21, rules 95 and 97, Civil Procedure Code. The Subordinate Judge, who heard the application, came to the conclusion that the properties were the self acquisitions of the respondent (father) and ordered delivery of possession. For reaching this conclusion he gave certain reasons. He stated that it was *prima facie* view that he was taking on the evidence before him and referred the sons to a regular suit for establishing the right set up by them to the properties. This order, was upheld by the District Judge (Mr. Shahabuddin) on appeal. He did not allow the partition deed to be filed on the ground that its production was at a late stage of the case and no adequate explanation had been given for the delay and that he did not consider its admission necessary for deciding the question at issue before him. On the evidence before him he saw no reason to differ from the Subordinate Judge and added; " As he has pointed out in his order, if the appellants have got any case they may file a suit ". In dismissing the revision petition against this order filed under section 75 of the Act, Burn, J. said, " Even if the contention of the petitioner (that the procedure followed by the insolvency Court was wholly wrong) are accepted, the findings of fact are such that the adoption of the correct procedure would have led to the same result. For this reason in the exercise of my discretion I decline to interfere in revision and dismiss this petition with costs".

It is contended for the appellant that the view taken by the learned Judge that this order in insolvency concludes the matter by reason of section 4 of the Insolvency Act is wrong for several reasons : firstly, the jurisdiction of section 4 was never invoked and there was as a matter of fact no decision on title given by the Court ; secondly, that the Court itself stated that the claim by the sons should be decided by a separate suit ; and thirdly , that it was open to the Court to leave the question open in this manner. That the petition was not filed under section 4 is obvious as it refers only to section 5 of the Provincial Insolvency Act and Order 21, rules 95 and 97 of the Civil Procedure Code. It also seems to be clear that there was no intention to invoke the jurisdiction of the Court under section 4 or under section 56 (3) of the Provincial Insolvency Act. There is little doubt on the authorities as they stand at present. See *Ramaswami Chettiar* v. *Ramaswami Iyengar*,[1] referred to and approved in *Vandarguzal Achi* v. *South India Corporation*[2], that the Court could have adjudicated on the question of title and it is difficult to hold that there was no such adjudication. The Court, as pointed out already, decided before directing possession to be given to the purchaser, that the properties constituted the self acquisitions of the father. This decision might have been rendered on imperfect materials and might have been based on what was called a *prima facie* view of the facts ; but the decision was still reached, and it is only because it was held that the sons had no interest in the property that their obstruction was ordered to be removed and possession was given to the purchaser. It is true that the Court thought that a separate suit would lie and this question of title may be agitated fully there ; but this opinion expressed by the insolvency Court cannot affect the rights of parties. As has been held more than once, if there is a final and conclusive adjudication by a competent Court of any issue between the parties, a mere direction by that Court that another proceeding might be taken for having the point more adequately considered and decided is of no avail, when we have to consider a plea

1. (1921) 42 M.L.J. 185 : I.L.R. 45 Mad. 434. (F.B.).
2. (1944) 2 M.L.J. 52 : I.L.R. (1945) Mad. 10

of *res judicata*. A decision under section 4 of the Provincial Insolvency Act is final and conclusive against the partition. As indicated above, the order made by the insolvency Court and affirmed on appeal and in revision cannot be attributed to any other jurisdiction than the one conferred on the insolvency Court under section 4. We cannot assume after all that has been done, that everything was without foundation and wholly wrong and that it is open to the parties to re-agitate their rights in fresh proceedings to be taken.

The result is unfortunate so far as the plaintiff is concerned, but it cannot be helped. Possibly this is one of those cases where the father is trying his best after a general wreck and ruin to see if something can be raised, for asking his sons to assert their rights.

In any event the plaintiff is bound by the mortgage created over the property and which the fourth defendant has paid off in pursuance of the obligation undertaken by him in connection with the sale from the Official Receiver. Mr. Veeraraghavachari for the appellant had to concede this liability.

The second appeal is dismissed but without any order as to costs in this Court, having regard to the fact that the suit was filed by the plaintiff-appellant at the suggestion of the insolvency Court. No leave.

V.P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Konnoth Meenakshi Amma .. *Appellant**

v.

The Province of Madras, represented by the Collector of South Kanara, Mangalore and others .. *Respondents.*

Civil Procedure Code (V of 1908), *section* 80—*Notice of suit to set aside revenue sale—Wrong survey number of the property sold given—Error fundamental and notice defective.*

A notice of suit under section 80, Civil Procedure Code to set aside a revenue sale gave the wrong survey number of the property sold. On a question as to the maintainability of the suit on such a notice,

Held, that the particulars required by section 80, Civil Procedure Code to be set out in the notice should be accurately given. The wrong description of the property is not an insubstantial error but is a fundamental one and in the absence of evidence that the error was *bona fide* and due to an accidental slip, the suit was not maintainable owing to the defective notice.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A. S. No. 69 of 1944 preferred against the decree of the Court of the District Munsiff, Kasargod in O. S. No. 198 of 1940.

P. Govinda Menon for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) and *A. Narayana Pai* for Respondents.

The Court delivered the following

JUDGMENT.—The lower appellate Court has held that the suit is not maintainable on the ground that the notice requisite under section 80 of the Code of Civil Procedure is defective. The suit was to set aside a revenue sale in respect of a certain holding in Nileshwar village, South Kanara district. The notice mentioned R. S. No. 722/4-B. It is now admitted that the sale that actually took place and in respect of which the plaintiff claims relief is of R. S. No. 722/4-A. The learned counsel for the appellant contended that the error in the notice arose on account of the *bona fide* clerical mistake and substantially the conditions required by section 80 of the Code of Civil Procedure have been complied with. He also relied on the ruling in *Venkataramakrishnier* v. *Secretary of State for India in Council*[1]. I do not agree that an error in the description of the subject-matter of the suit is an insubstantial error. I may also add that there is no evidence in this case that the error

---

* S. A. No. 2217 of 1944. 24th August, 1945.

1. (1925) 23 L.W. 464.

was *bona fide* and due to an accidental slip. There can be no doubt that the particulars required by section 80 of the Code of Civil Procedure to be set out in the notice should be accurately given. The ruling in *Venkataramakrishnier* v. *Secretary of State for India in Council*[1] which was relied on cannot help the appellant in this case, because the error here is fundamental. The second appeal is dismissed with costs.—One set.

Leave refused.

V.P.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Venkatachala Pillai .. *Appellant**

v.

M. R. Rajagopal Naidu and another .. *Respondents.*

Transfer of Property Act (IV of 1882), secrions 100 and 52—Words ' by operation of law ' in section 100 include charge created by decree of Court—Maintenance decree—Sale in execution—Right of mortgagee subsequent to decree to redeem and pay off the charge decree—Rights of auction purchaser.

The words 'by operation of law' occurring in section 100 of the Transfer of Property Act, include a charge brought into being by a decree of a competent Court.

Abdul Gaffar v. *Ishtiaq Ali*, A.I.R. 1943 Oudh 354 (F.B.) followed.

In execution of a maintenance decree a property was sold and a mortgagee of the property subsequent to the decree claimed that as long as the sale was not confirmed, he was entitled to redeem and pay off the charge decree. On an objection by the auction purchaser that the mortgagee had lost any right to redeem any prior encumbrance by reason of the doctrine of *lis pendens*,

Held, negativing such a contention, that the offer of the mortgagee to pay off the prior encumbrance meant that he will *pro tanto* pay off the decreeholder whose rights are those which are protected under section 52 of the Transfer of Property Act.

As the sale had not been confirmed, all that the auction purchaser (the only person that can possibly be aggrieved) could claim is compensation for his trouble in respect of what had proved to be from his point of view an abortive auction.

Ramaswami Pillai v. *Trichinopoly Credit Bank, Ltd.*, (1935) 69 M.L.J. 447 : I.L.R. 59 Mad. 101 distinguished.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Poonamallee, dated 1st May, 1944, and made in O. P. No. 15 of 1944.

N. Panchapagesa Aiyar for Petitioner.

L. V. Krishnaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is against a decision in an execution application before the District Munsiff of Poonamallee. The matter arose out of a maintenance suit which resulted in a decree dated 19th March, 1936. This was modified on 6th July, 1938, on appeal. Later, the decree-holder assigned it to the first respondent, in the lower Court. He brought the properties to sale in execution and a sale took place on 1st September, 1943. The second respondent in the lower Court —the petitioner here—bought some of the property in question. On 30th March, 1938, some of the same properties had been mortgaged to the petitioner in the lower Court, the first respondent here. In the lower Court, the mortgagee finding that the decree had been executed and property brought to sale by the assignee-decree-holder had been purchased by a stranger, filed an execution application, the execution application with which we are concerned, and succeeded in setting aside the sale on the ground of certain irregularities. The assignee decree-holder offered no objection because he no doubt knew that the mortgagee-petitioner was prepared to pay the amount of the maintenance instalments due under the decree and for which it had been brought to execution. After various applications, the order setting aside the sale was reversed and the mortgagee thereupon filed O. P. No. 15 of 1944, claiming that he was entitled to

1. (1925) 23 L.W. 464.

*C. R. P. No. 1573 of 1944. 20th April, 1945.

redeem and pay off the charge decree so long as the sale had not been confirmed. In this contention he was upheld by the District Munsiff and the auction-purchaser comes in revision to this Court.

Two points were raised based on certain authorities. The first was that under section 100 of the Transfer of Property Act a charge must be brought into existence either by act of parties or by operation of law and inasmuch as the charge here was brought into being by a decree, different considerations apply. The petitioner relied on *Ghasiram* v. *Kandanbai*[1] where a Bench of two judges held that " by operation of law " was not the same thing as saying " by decree." In *Abdul Ghaffar* v. *Ishtiaq Ali*[2] a Full Bench took a contrary view. A Bombay Court in *Rustamall* v. *Aftabhusein Khan*[3] approved the Oudh decision in *Abdul Ghaffar* v. *Ishtiaq Ali*[2]. With the greatest respect I prefer the Oudh point of view rather than that of Nagpur in *Ghasiram* v. *Kundanbai*[1], and I think the words " by operation of law " do include a charge brought into being by a decree of a competent Court.

The second point was that inasmuch as the mortgage was executed after a decree had been passed, the mortgagee by reason of the doctrine of *lis pendens* had lost any right to redeem any prior encumbrance. The petitioner relied on two cases : *Madhoram Sand* v. *Kirtya Nand Sinha*[4] a decision of the Privy Council, where the facts in my opinion are quite different and afford no guidance and *Ramaswami Pillai* v. *Trichinopoly Co-operative Credit Bank, Ltd.*[5] The latter case deals with facts which are more like those of the present case, but with the important difference that in that case the sale had been confirmed and whole of the transaction relating to the execution of the decree was finished. The Court there held that in such circumstances a subsequent mortgagee seeking to redeem had lost any possible right to interfere. In the present case, the mortgagee does not dispute the fact that he took the mortgage subject to the charge. His offer to pay off the prior encumbrance means that he will *pro tanto* pay off the decree-holder whose rights are those which are protected under section 52 of the Transfer of Property Act. The only person that can possibly be aggrieved is the auction-purchaser, but his sale has not been confirmed and all that he can claim is that he be compensated for the trouble, time and money that he has wasted in attending to what has proved to be from his point of view an abortive auction.

In the result, I think that the decision of the lower Court is right and this petition should be dismissed with costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Captain David Aberneathy Greenwood .. *Appellant**

v.

Gladys Hildred Greenwood (otherwise Dee) .. *Respondent.*

Indian Divorce Act (VI of 1869), *section* 19 (4) *and Evidence Act (I of* 1872), *section* 107—*Petition by wife to declare marriage null and void on the ground of the existence of a first wife—Onus—Presumption stated in section* 107, *Evidence Act, could not be relied upon—Inapplicability of section* 107.

In a petition by the wife under the Indian Divorce Act to declare her marriage with the counter-petitioner null and void on the ground that the latter's first wife was alive, the petitioner failed to prove that fact but maintained that she was entitled to rely on the presumption stated in section 107

1. I.L.R. (1941) Nag. 513.
2. A.I.R. 1943 Oudh 354 (F.B.).
3. A.I.R. 1943 Bom. 414.
4. (1944) 2 M.L.J. 343 (P.C.).
5. (1935) 69 M.L.J. 447 : I.L.R. 59 Mad. 101.

* O. S. A. No. 53 of 1944. 30th July, 1945.

of the Evidence Act and that all that she had to prove was that the first wife was alive within 30 years of the petition and that if the husband failed to prove affirmatively that his first wife was dead on the date of the second marriage, she was entitled to the declaration asked for.

Held, negativing the petitioner's contentions, that the Indian Divorce Act governed the proceedings and that by reason of the provisions of section 19 (4) of that Act which indicates plainly that a decree for nullity can only be given on proof of the fact that the former husband or wife was living at the time of the second marriage, there was no room for the application of section 107 of the Evidence Act and it must be ignored as being in conflict with the provisions of the Indian Divorce Act.

It could also be said that the very nature of the relief sought demanded positive proof on the part of the petitioner that the first wife was alive on the date of the second marriage.

On appeal from the judgment and decree *nisi* of Kunhi Raman, J., dated 11th August, 1944, and passed in the exercise of the Original Matrimonial Jurisdiction of the High Court in O. M. S. No. 18 of 1943.

Dr. V. K. John of Messrs. John and Row, *Sita Devi* and *R. Rajeswara Rao* for Appellant.

O. T. G. Nambiar instructed by *Messrs. King and Partridge* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This case is unparalleled and it raises an important question of law. The appellant was married to the respondent on the 9th June, 1933, at All Souls Church, Coimbatore. The appellant had been previously married, but he had not heard of his first wife for over seven years and consequently presumed her to be dead. The appeal arises out of a petition filed by the respondent on the Original Side of this Court under the Indian Divorce Act for a declaration that her marriage with the appellant was null and void because his first wife was still alive. She failed to prove this fact, but maintained that she was entitled to rely on the presumption stated in section 107 of the Indian Evidence Act, which says that when the question is whether a person is alive or dead, and it is shown that the person was alive within 30 years, the burden of proving the person to be dead is on him who affirms it. In other words, she maintained that all she had to prove was that the appellant's first wife was alive within 30 years of the petition and if the appellant failed to prove affirmatively that his first wife was dead on the 9th June, 1933, she was entitled to the declaration. The learned Judge accepted this argument and as there was no evidence on the record that the first wife was dead when the second marriage took place he granted her petition. The appellant says that the respondent cannot be given the relief sought by her unless she proves positively that his first wife was alive on the date of the second marriage.

Before dealing with the question of law involved, we will state the facts in some detail. The appellant's first marriage was to one Mary Rachel Greenwood and took place at the Roman Catholic Church, Agra Cantonment, on the 10th September, 1913. On the 12th July, 1914, a son was born to this union. On the 20th January, 1920, the wife left her husband and took the boy with her; but in the month of November of the following year she handed over the child to him at Bellary where he was employed as the superintendent of the local jail. From then until the middle of 1923, they corresponded, but the correspondence then ceased. In 1924, the appellant took the boy to England, and placed him in a school there. In 1927, the boy was taken seriously ill and the appellant tried to get in touch with his wife but all his letters were returned and he failed to discover whether she was alive or dead.

Not having heard anything of his first wife after 1923 the appellant in 1933, presumed her to be dead and he proposed marriage to the respondent. The respondent is an Anglo-Indian and, being then 20 years of age, was a major. The appellant disclosed to her and to her father the fact of his previous marriage and the subsequent events. The priest whose duty it would be to marry them in the absence of lawful

impediment was consulted and at his suggestion the appellant made further enquiries with the view to ascertaining whether his first wife was alive. The enquiries failed to produce any information with regard to her, and the respondent and her father being satisfied that the first wife had not been heard of for over seven years, the respondent agreed to marry the appellant. The marriage ceremony was duly performed and the respondent has borne to the appellant two children, a boy and a girl, both of whom are alive.

The appellant avers that the respondent filed the petition for the declaration of nullity of the marriage because she intended to marry an army officer with whom he alleges she is living in adultery. If the respondent's marriage to the appellant is a nullity, the question of her intimacy with another man will not be a factor in the case; but the Court can inquire into the respondent's motive in instituting these proceedings. In her petition she asked for an order giving her the custody of the children and the appellant was prepared to resist this application on the ground that she was living in adultery. Realising that this question would have to be investigated if she persisted in her application for the custody of the children, she abandoned that part of her case and asked that the custody be given to her father. These facts do support the appellant's contention that the respondent's petition has been filed with an ulterior object. The appellant vigorously opposed the petition, realising that if it were granted it would involve a declaration of the illegitimacy of his children by the respondent.

In the course of the hearing the respondent produced four letters dated the 18th May, 1925, the 10th June, 1925, the 10th September, 1925, and the 8th January, 1926, respectively, which she says were written by the first wife to the appellant. She has also produced a letter which she says the first wife wrote to the respondent's father on the 3rd September, 1934, that is, after the respondent's marriage to the appellant. The appellant says that these letters are forgeries. The learned Judge refused to have regard to them because there was no evidence proving that they are in the handwriting of the first wife. This being the case, the learned Judge was quite right in ignoring them. Without proof that they were written by the first wife the Court cannot, in view of the appellant's denial of their authenticity, have any regard to them. We may add that the appeal has proceeded on the basis that there is no evidence that the first wife was alive on the 9th June, 1933.

The appellant says that the Court is not entitled to have regard to section 107 of the Indian Evidence Act because of the provisions of section 108. The latter section reads as follows:

"Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

The appellant says that as his first wife had not been heard of for seven years when he married the respondent, the burden of proving that his first wife is alive is shifted to the respondent, which means that so far as this case is concerned section 108 overrides section 107. The learned Judge held that section 108 did not apply because the appellant was not a person who would naturally have heard of his first wife if she had been alive. Her parents were dead. Her only brother was a prisoner of war in Malaya and therefore without means of communication. His first wife had left him in 1920 and correspondence with her had ceased in 1923. In these circumstances the learned Judge considered that the requirements of the section had not been fulfilled. We are not altogether convinced that this is a proper way of looking at the question. His first wife had borne him a son and for the latter's sake she might have written to him as she had done up to the middle of 1923. At the same time we do not propose to base our decision on the effect of section 108 in this case. We will assume that the learned Judge was here right.

We will now pass on to consider the appellant's contention that in order to succeed the respondent must prove by positive evidence that his first wife was alive

on the date of the second marriage. It must be borne in mind that the Divorce Court exercises a peculiar jurisdiction. In *Hyman* v. *Hyman, Huges* v. *Hughes*[1], Scrutton, L.J., said that the Divorce Court is entrusted with a jurisdiction of national importance. The stability of the marriage tie, and the terms on which it should be dissolved, involve far wider considerations than the will or consent of the parties to the marriage. The Divorce Court does not, as other Courts do, act on mere consents or defaults of pleading, or mere admissions by the parties; nor does it readily act on uncorroborated confessions. Scrutton, L.J., went on to say:

"When the full Court of Appeal in *Harriman* v. *Harriman*[2] discussed the effect of estoppel of the parties on the jurisdiction of the Court, Lord Cozens-Hardy said: 'The jurisdiction in matters of divorce is not affected by consent. No admission of cruelty or adultery, however formal, can bind the Court. The public interest does not allow parties to obtain divorce by consent, and the analogy of ordinary actions cannot be applied': *See* Fletcher Moulton, L.J.[3] and Farwell, L.J.[4]. In the King's Bench Division, if default is made in delivering defence, the plaintiff is entitled to judgment on the allegations in the statement of claim, which are taken to be admitted without proof. In the Divorce Division the petitioner must prove his case, though the respondent does not defend. Many agreements between husband and wife will not be recognised as being contrary to public policy. An agreement to separate in three years' time; an agreement not to take divorce proceedings for future adultery, will not be enforced or recognised by the Court. Collusive or condoned adultery will not be a foundation for a petition for divorce. The alteration of the status of marriage involves considerations far beyond the private agreement of the parties."

These observations apply equally to divorce and nullity proceedings in India.

In England there is no such presumption as that allowed by section 107 of the Indian Evidence Act, and therefore under English Law the respondent would undoubtedly have to prove that the appellant's first wife was alive on the 9th June, 1933, in order to get a decree of nullity. The question then is whether section 107 applies to a petition for a declaration of nullity under the Indian Divorce Act. In our judgment it does not, by reason of the provisions of sections 7 and 19 (4) of the Indian Divorce Act. Section 7 of that Act states that the Courts shall in all suits and proceedings thereunder act and give relief on principles and rules which, in their opinion, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. Section 19 (4) indicates in plain language that a decree for nullity can only be given on proof of the fact that the former husband or wife was living at the time of the second marriage. There is no room left here for the application of section 107 of the Indian Evidence Act. The Indian Divorce Act governs these proceedings and section 107 of the Evidence Act must be ignored as it is in conflict. It would indeed be a lamentable situation if parties could marry under the circumstances and with the knowledge with which the parties to this case were married and then one of them could have the marriage declared null and void on a mere presumption, especially when it involved the issue of the marriage being regarded as illegitimate. Fortunately the provisions of the Indian Divorce Act preclude the operation of section 107 of the Indian Evidence Act in such a case and consequently we are not called upon to decide whether the section could be invoked had the Indian Divorce Act been silent on the question. We may, however, add that there appears to be substance in the argument of the learned counsel for the appellant that the very nature of the relief sought demanded positive proof on the part of the respondent that the appellant's first wife was alive on the 9th June, 1933.

The appeal is allowed and the respondent's petition dismissed.

V.S. *Appeal allowed.*

---

1. (1929) P. 1 at 30 and 31.
2. (1909) P. 123, 131.
3. (1909) P. 142.
4. (1909) P. 144.

[PRIVY COUNCIL.]

(On appeal from the Chief Court of Oudh.)

PRESENT :—LORD THANKERTON, LORD MACMILLAN, LORD SIMONDS, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Thakur Lalta Bakhsh Singh and others . . . . *Appellants**

v.

Lala Phool Chand and others. . . . . *Respondents.*

Will—Construction—Hindu testator making provision for father's sister and his own sisters " in case there is no male or female issue and wife "—Testator dying leaving two widows and some of the legatees and their children —Suit by the son of the testator's father's sister and his transferees to recover the property in the possession of sons of the testator's sister—Limitation—Starting point—Limitation Act (IX of 1908), *articles* 140 *and* 141.

The relevant portion of the will of a Hindu testator was in the following terms : " That in case there is no male and female issue and wife, the wife of *B* . . . . . who is the aunt (father's sister) of the executant and also . . . . (description of three ladies), who are the sisters of me, the executant, shall divide the aforesaid property equally amongst themselves and after them their male and female issue shall be the owners and in case there is no issue, then the female shall continue to enjoy and possess her share till her lifetime, and after her demise her husband shall remain in possession and occupation of her property till his lifetime and after him that very share shall be divided equally upon the issue of those ladies out of the aforesaid four ladies who have got issue.". The testator died issueless on the 20th May, 1913, leaving behind, a senior and a junior widow, who entered into possession of the property and died in 1916 and 1924 respectively. Two of the testator's legatee sisters predeceased him. In 1933 the son of *B* and the transferees from him sued to recover the property from the sons of the surviving sister of the testator who were in possession of it. It was contended that because of the existence of the two wives at the time of the testator's death, the contingency contemplated for the operation of the provision in the will, *i.e.*, " in case there is no male or female issue and wife " did not arise and that the son of *B* therefore never took any interest under the will and that even if he took any share, his claim was barred by limitation and that the shares of the predeceased sisters had lapsed.

Held, (1) that the testator intended in the relevant paragraph of the will that the legacies to the four ladies mentioned in it were to take effect after the wife is no more, that is, the wife of the testator should enjoy the property during her lifetime and, after her death, the legatees should take their shares, it being admitted that the testator left no issue male or female. (2) That the junior widow took an interest for her life whether by implication under the will or under the Hindu law and she having remained in possession until her death, the cause of action for the suit arose only after her death in 1924 and hence the suit brought in 1933 was not barred by limitation. (3) That the testator under the relevant paragraph of the will had granted only life estates to the ladies mentioned therein and on their death he had given their shares to their children if any ; and in case there was no issue, then to their husbands and after them he had decided that those shares should be divided equally amongst the children of those sisters who had issue with the result the shares of the predeceased sisters will be divided between the children of the other sisters and that hence the question of the lapse of the shares did not arise.

It was further *held*, that the sons of the legatee sister who had paid the debts of the testator were entitled to the interest on the amount found due to them on this account.

C. S. Rewcastle and *J. M. Pringle* for Appellants.

W. Wallach for Respondents.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal from a decree of the Chief Court of Oudh dated 12th December, 1939, which modified a decree of the Additional Civil Judge of Bara Banki dated 12th October, 1936, by affirming the said decree on condition of respondents 1 to 3 hereinafter called the respondents (who were plaintiffs Nos. 2, 3 and 4 in the suit) paying the appellants (defendants 1 to 5) a sum of Rs. 13,592. The said decree awarded the respondents 7/20th (equivalent to 5 annas 7 1/5th pies) share in the property claimed in the suit.

The suit out of which this appeal arises was originally brought to recover possession of the entire property (16 annas share) mentioned in the plaint ; but it came to be confined to a 9 annas share only. Plaintiff No. 1 considering himself entitled to the entire property in suit under a will dated 30th March, 1896, executed by one Prag Baksh Singh (hereinafter called the " testator "), sold a 9 annas share of it to the respondents by means of two successive sale deeds in 1932 and 1933

* P. C. Appeal No. 46 of 1942. 6th February, 1945.

and another 2 annas out of the remaining 7 annas share to plaintiffs Nos. 5 and 6, who afterwards withdrew from the suit by virtue of a compromise with the defendants. Later on, plaintiff No. 1 also withdrew from the suit. Thus, out of the 6 plaintiffs, plaintiffs Nos. 1, 5 and 6 withdrew, and the suit was continued by the respondents in respect of the 9 annas share in the suit property which they had purchased from plaintiff No. 1. The disputed property was admittedly in the possession of the appellants.

The testator to whom the property in suit belonged died on 20th May, 1913. His relationship with the appellants and plaintiff No. 1 will appear from the following pedigree :

Ganga — Umrao

Jaskaram; Mangal Kuer = Shahaj; Jaiwant = Bhagwan = Munraj (d. 1907)

Ramanuj Plff. No. 1.

Prag
Muna Kuar = testatator = Muna Kuar
Senior (died 1916) issueless; (died 1913) issueless; Junior (died 1924) issueless.

testator's sister married Chandrika issueless.

testator's sister predeceased testator married Durga issueless but adopted Applt. No. 1.

testator's sister predeceased testator married Sher Bahadur issueless.

testator's sister. Bachchi Kuar married Debi (d. 1924).

Appellant No. 1; Applts. Nos. 2 to 4.

Bitya Rani = Appellant No. 5.

It will be seen from the pedigree that the testator died issueless but he left two widows—both called Muna Kuar—the senior of whom died on 20th August, 1916, and the junior on 24th April, 1924. The testator left two sisters also, one of whom Bachchi Kuar had 4 sons, appellants Nos. 1 to 4. Appellant No. 5 is the husband of appellant No. 1's deceased daughter. To her appellant No. 1 had given a village out of the property in suit. It is not now in dispute that appellants Nos. 1 to 4 are the sons of the testator's sister who was married to Debi Baksh Singh.

It will be further seen that the testator's father's sister married one Shahaj and that Shahaj had a brother called Bhagwan whose first wife was the mother of plaintiff No. 1. Plaintiff No. 1 thus appears to be no relation of the testator, but it is not now in dispute that the son of the testator's aunt, the wife of Bhagwan Singh, is Ramanuj plaintiff No. 1.

The main questions involved in the appeal relate to the respective rights of the parties to the suit property. As these depend on the construction of the will of the testator it is necessary to reproduce the relevant portions of it which are as follows :

"Para. 1. That after the death of the executant the wife of the executant shall possess and enjoy the entire aforesaid property without any rights of transfer, *e.g.*, mortgage, sale and gift, etc., up to the time her conduct and character is not contrary to that of kith and kin, *i.e.*, (up to the time) she is not guilty of any immorality.

Para. 2. That if the executant contracts a second marriage in the lifetime of the said wife and has any child male or female from the second wife, then the former wife shall be entitled as against the issue from the latter to receive as much Guzara as may suffice for her maintenance.

Para. 3. That in case there is no male and female issue and wife, the wife of Bhagwan Bux Singh, taluqdar Lahar, Pergana. Haidergarh, district Bara Banki, who is the aunt (father's sister) of the executant and also the wife of Thakur Durga Bux Singh, taluqdar Nilgaon, the wife of Thakur Debi Bux Singh, resident of village Kundi, district Sitapur, and wife of Thakur Sher Bahadur Singh, taluqdar Muhommadpur, pergana Fatehpur, district Bara Banki, who are the sisters of me, the executant, shall divide the aforesaid property equally amongst themselves and after them their male and female issues shall be the owners and in case there is no issue, then that female shall continue

to enjoy and possess her share till her lifetime and after her demise her husband shall remain in possession and occupation of her property till his lifetime and after him that very share shall be divided equally upon the issue of those ladies out of the aforesaid four ladies who have got issue.

Para. 4. That no other member of my family is entitled to my property, nor has he any claim to it. If there appears any claimant, then his claim as against the aforementioned four ladies shall be void and untenable."

On the testator's death, his two widows entered into possession of the property. When the senior widow died, a dispute arose between the junior widow, and the testator's sister Bachchi Kuar, mother of the appellants Nos. 1 to 4, regarding the rights of the former in the property. At about this time the pressure of mortgage debts contracted by the testator, at high rates of interest threatened a disruption of the estate and the question of payment of the debts became urgent. The situation was met by the execution of a family settlement dated 1917, the only importance of which, so far as the present appeal is concerned, is that under it appellant No. 1, in consideration of being allowed certain properties, took over the liability of paying all the debts due from the estate of the testator. It has now been found that in all a sum of Rs. 71,992 was paid by appellant No. 1 to the creditors of the testator and that he spent a further sum of Rs. 1,127-6-0, in litigation about the debts, the total sum amounting to Rs. 73,119-6-0. This finding, arrived at by the High Court, has not been questioned before the Board. It has also been found that the above payments made by appellant No. 1 were by no means voluntary, but were made by him as having an interest in the property.

The appellants, and the respondents (transferees from plaintiff No. 1), both rest their claim to the property in the suit on the terms of the will. Generally stated, the appellants contended, amongst other grounds which need not be detailed, that plaintiff No. 1 is not entitled to any property under the testator's will, as he is not the son of the testator's aunt, that the right to the property, if he took any under the will, was barred by limitation under article 140 or 141 of the Indian Limitation Act, that the appellant No. 1 had paid up the debts of the testator and had incurred costs in connection with litigation relating to those debts, and that he was entitled to recover the same with interest from persons claiming the property. Article 140 of the Limitation Act prescribes a period of "12 years" for a suit "for possession of immoveable property by a remainderman, a reversioner (other than a landlord) or a devisee," and the period begins to run from the time "when his estate falls into possession." Article 141 prescribes a period of 12 years for "a like suit" by a Hindu or Mohammedan entitled to the possession of immoveable property on the death of a Hindu or Mohammedan "female" and the period begins to run from the time "when the female dies."

Holding that plaintiff No. 1 is the son of the testator's aunt referred to in the will which finding, as stated already, is not challenged before the Board, the Subordinate Judge came to the conclusion on a construction of the third paragraph of the will that he was entitled to 7/20ths share of the property in the suit and that the suit was not barred by limitation. As regards the debts alleged to have been paid by appellant No. 1, he held that these amounted to Rs. 71,992 but that he was not entitled to recover anything from the respondents as the income realised by the appellants who were in possession of the property amounted to Rs. 1,00,000. The Subordinate Judge also held that appellant No. 1 was not entitled to any costs of litigation and interest. In the result, he gave a decree in favour of the respondents for possession of 7/20ths share (equivalent to 5 annas 7 1/5 pies out of 16 annas) in the entire property in suit—though a 9 annas share had been sold to them—along with the mesne profits which were left to be determined later.

Their Lordships may now conveniently refer to the Subordinate Judge's construction of the third paragraph of the will and also to the reasoning on which his finding as to limitation is based. As regards the first it will be remembered that when the testator died issueless on 20th May, 1913, he left surviving him two widows, his sister Bachchi Kuar, the mother of the appellants, and plaintiff No. 1 the son of Bhagwan and his first wife mentioned in clause (3), as the first of the four lady

legatees. His other sisters mentioned in the will and their husbands had died issueless. The construction put upon the third paragraph of the will by the Subordinate Judge has been thus correctly summarised by the High Court.

"The Court held that as on the death of Mussammat Muna Kuar junior the issue of only two of the four ladies mentioned in the will, namely, plaintiff No. 1 (son of the wife of Bhagwan Baksh Singh) and defendants Nos. 1 to 4 (sons of Bachchi Kuar sister of Prag Baksh Singh and wife of Debi Baksh Singh) were living, one-fourth of the property would go to plaintiff No. 1 and another one-fourth to defendants Nos. 1 to 4 and that the remaining half of the property would be divided equally among the issues of the wife of Bhagwan Baksh Singh and Mussammat Bachchi Kuar under clause (3) of the will, so that plaintiff No. 1 and defendants Nos. 1 to 4 would each be entitled to a one-fifth share out of the remaining half. In this way the Court found that the share of plaintiff No. 1 in the entire property of Durga Baksh Singh was one-fourth plus one-tenth, that is, seven-twentieth."

On the question of limitation, the Subordinate Judge held that time began to run against the plaintiff only from the death of the junior widow in 1924, and as the suit was brought within 12 years from that date, it was not barred by limitation either under article 140 or 141 of the Limitation Act, whichever article applied, overruling the appellants' contention that limitation began to run from the death of the senior widow which took place in 1916.

On appeal to the High Court, the learned Judges agreed with the opinion of the Subordinate Judge on the construction of the third clause of the will and with respect to the share of the property that plaintiff No. 1 was entitled to get under it, and also on the question of limitation, but differed from him as regards the claims of the appellants to recover from plaintiff No. 1, *i.e.*, his transferees, his share of the debt found binding on the testator's estate discharged by appellant No. 1, and of the litigation expenses incurred by him. As stated already they held that a total Rs. 73,119-6-0 had been spent by appellant No. 1 by way of paying the creditors of the testator and meeting the litigation expenses, and that the respondents should bear their portion of this debt. As a result of the finding called for from the lower Court it was found that the profits realised by the appellants from the suit property after the death of Muna Kuar junior up to 23rd July, 1913, that is up to three years before the suit, amounted to Rs. 34,285-11-5. The learned Judges therefore held that "the plaintiffs' proportionate (7/20ths) share of this liability comes to Rs. 25,592 approximately. As their share of the profits is Rs. 12,000, there is a balance of Rs. 13,592 against them and this they must pay to the defendants before getting possession of the property". The learned Judges, however, refused to award interest on the amount claimed by them on the ground that "they have been in possession of the property and in receipt of the profits thereof in lieu of that money." In the result, they modified the decree passed by the Subordinate Judge in favour of the respondents by decreeing them "possession of 7/20ths of the property in suit on condition of their paying Rs. 13,592 to the defendants (appellants)." In support of this appeal, the learned counsel for the appellants urged (1) that plaintiff No. 1 from whom the respondents derived their tittle to the property, took nothing under the testator's will because the operation of clause 3 of the will was limited to a contingency which never arose in the case ; (2) that if plaintiff No. 1 took any interst at all under the will, it became vested in him at the senior widow's death in 1916 and the suit to enforce his claim is now barred ; (3) that, since the two sisters of the testator for whom provision had been made in the will, had predeceased him, their portions lapsed and plaintiff No. 1 can have no share in them ; (4) (*a*) that, appellant No. 1 should have been allowed interest on the sum due to him and (*b*) that he should not have been made liable to account to the respondents for any of the profits of the property sued for in respect of any period ending three years before suit ; and (5) that, since plaintiff No. 1 was not able to give the respondents full title to nine annas share in the suit property, they could claim only damages as provided for in the deed, and that in any event, the respondents could be given a decree only for 9/16ths of the share held to belong to plaintiff No. 1 *i.e.*, 9/16ths of 7/20 and not 7/20ths of the suit property, as he sold them only 9 annas out of the 16 annas share of the property.

Their Lordships will now proceed to consider these arguments in order.

As regards ground (1), it may be mentioned that before the Courts in India Plaintiff No. 1 was sought to be excluded from sharing the property not on the ground now alleged but on other grounds; however, as the point relates to the construction of the will, their Lordships will consider it. It is argued that though the testator had no male or female issue, having regard to the fact that his two wives were living at the time of his death the contingency contemplated for the operation of the third paragraph of the will, namely, " in case there is no male and female issue and wife " did not arise, and therefore Plaintiff No. 1 never took any interest under the will. The argument is ingenious, but their Lordships are unable to accept it. The will is in Urdu and the Subordinate Judge says

> " the language used is simple and to my mind there is absolutely no ambiguity in the bequest made by Prag Bakhsh Singh."

The words relied on in the English translation have no technical singificance. It is obvious that the will has not been drawn up by any trained conveyancer. As was observed by their Lordships in *Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row*[1], in construing a will,

> " the primary duty of a Court is to ascertain from the language of the testator what were his intentions"

and

> " in doing so they are entitled and bound to bear in mind other matters than merely the words used."

These other matters would include the 'surrounding circumstances' and their Lordships proceed to say,

> " that native testators should be ignorant of the legal phrases proper to express their intentions or of the legal steps necessary to carry them into effect is one of the most important of circumstances which the Courts must bear in mind and it is justified in refusing to allow defects in expression in these matters to prevent the carrying out of the testator's true intentions. But these intentions must be ascertained by the proper construction of the words he uses and once ascertained they must not be departed from."

It is also well settled

> " that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention; and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied . . . . ."

See *Bhagabati Barmanya* v. *Kalicharan Singh*[2]. Applying these principles, the true intention of the testator has to be ascertained from the language used by him in the will.

Except the inference drawn from the words " in case there is no male and female issue and wife." nothing has been suggested as to why the testator should have intended when he made the will that if his wife or wives survived him (there being no male and female issue) the legatees mentioned in paragraph 3 of the will should forfeit their legacies. In the present case, the testator had a wife living when he made the will. In the ordinary course he would be succeeded by his wife and after her death the properties would pass to others according to law; but provision has now been made by the testator as to whom they should pass after her death. This is what has been done in paragraph 3 of the will. It has not been argued that the testator could not validly make the arrangements which he has made, the property being his own. It appears to their Lordships that the intention of the testator which they have to seek is sufficiently clear. He intended that the legatees mentioned in paragraph 3 of the will, who of course would include plaintiff No. 1, should take their legacies when the wife is dead, which means that the bequests made in the clause will not operate as long as the widow (or either of the two widows) lived. Their Lordships see no reason why they should construe the expression

---

1. (1913) 26 M.L.J. 411: L.R. 41 I.A. 51: I.L.R. 37 Mad. 199 (P.C.).
2. (1911) 21 M.L.J. 387: L.R. 38 I.A. 54: I.L.R. 38 Cal. 468 (P.C.).

"in case . . . . no wife" in any sense other than this, namely, that the testator intended in that paragraph that the legacies to the four ladies mentioned in it were to take effect after the wife is no more, that is, the wife of the testator should enjoy the property during her lifetime and, after her death, the legatees should take their shares, it being admitted that the testator left no issue male or female. In their Lordships' view this construction would be more consonant with the "habits of thought" in the mind of a Hindu testator, than what has been suggested by the Appellants' learned counsel. A more felicitous expression or a fuller one than the one in question might well have been chosen by the testator to express his intention more clearly, but before the Subordinate Judge, the language of the will, as stated by him, did not create any difficulty, and the point now urged was not taken either before him or before the High Court. As well pointed out by their Lordships in the case mentioned above,

> "defects in expression should not be allowed to prevent the carrying out of the testator's intentions."

In this view of the third paragraph of the will, plaintiff No. 1 cannot be excluded from taking the benefits under the will if he is not disentitled in any other way.

It was next urged, that if the plaintiff took any share of the property under the will, his claim was barred by limitation. In this connection it is said that the wife referred to in paragraph 3 of the will after whose death the legacies would take effect is the senior wife of the testator and as she died in 1916, more than 12 years before suit, it is barred by limitation either by Article 140 or 141. This argument is based on the contention that no provision has been made in the will for the junior widow and the wife in paragraph 3 cannot therefore be the junior wife who admittedly died within 12 years before suit. Both Courts in India have rejected the argument for very good reasons. It is true that no express provision has been made by the testator for the junior widow, but their Lordships feel no doubt that she takes an interest for her life whether by implication under the will as the High Court thought or under the Hindu Law, it is not necessary to determine. Their Lordships would only add that so far as the widows themselves were concerned, they never seemed to have thought that the testator had not made any provision for the junior widow, for their Lordships find that on the testator's death his two widows entered into equal possession of the property and mutation was made for equal shares. They also find (*see* the Subordinate Judge's judgment) that on the death of the senior widow of the testator the junior widow remained in possession of the entire property and the Subordinate Judge states his opinion that:

> "this was quite in accordance with the intentions and wishes of the testator as expressed in clause 3 of the will."

The testator having made provision for the junior widow, and she having remained in possession until her death the cause of action for the suit arose only after her death which took place in 1924, and, as the suit was brought in 1933, it is not barred by limitation.

It was next argued, that the shares of the predeceased sisters of the testator have lapsed and should not have been divided amongst the children of the other sisters. The answer to this question would depend upon the correct construction of paragraph 3 of the will. Courts in India have taken the view that the testator under paragraph 3 of the will has granted only life estates to the ladies mentioned therein and that on their death he has given their shares to their children, if they have any; and in case there is no issue then to their husbands and after them he has decided that those shares should be divided equally amongst the children of those sisters who have issue. In this view of the will, with which their Lordships agree, the shares of the predeceased sisters will be divided between the children of the other sisters as held by the Courts in India and the question of the lapse of the shares does not arise.

The next argument related to the interest claimed by appellant No. 1 on the money—Rs. 13,592—which the High Court has found should be paid by the res-

pondents before they obtain delivery of their share of property decreed in their favour. Since the appellants have already discharged the debt of the testator by making this payment which rightly falls to the share of the respondents, it cannot be seriously contended that interest should not be paid on the same to the appellants. Their Lordships hold that the appellants are entitled to interest on Rs. 13,592 which they decide should be at 6 per cent. the usual Court rate (from 1st January, 1921, to the beginning of the three years before suit). In connection with this argument, Mr. Pringle, learned junior counsel for the appellants, desired to advance the view that appellant No. 1 was not liable to account to the respondents for any of the profits of the property sued for in respect of any period ending three years before suit and that the High Court was wrong in holding that he was so liable. This ground was not taken in the appellants' case but was taken only now. Their Lordships are not therefore inclined to allow the learned Counsel to argue this question.

The next argument urged but faintly was that inasmuch as plaintiff No. 1 was not able to give the respondents the full 9 annas share of the property sold to them under the sale deeds, they are entitled to claim from the vendor only damages as provided for in the sale deeds. In their Lordships' view the terms of the deed do not necessarily preclude the respondents from recovering whatever share falls to plaintiff No. 1 even though they are not entitled to get the full 9 annas share. In equity they are entitled to get the smaller share now decreed to them.

The last argument urged was that in any event the respondents are entitled to only 9/16ths of the 7/20ths of the sold property now found to belong to plaintiff No. 1. This argument urged also before the High Court, was rightly rejected by the learned Judges for the reason that:

"Sale deed Ex. II, clearly shows that Ramanuj Bhan Bakhsh Singh (plaintiff No. 1) sold a 9 annas share in the entire villages and other properties in dispute and the sale was held by this Court to be a sale of the property and not merely of Ramanuj Bhan Bakhsh Singh's right to sue. There is therefore no reason to reduce the property purchased by plaintiffs Nos. 2 to 4 (the respondents) to a fraction of what Ramanuj Bhan Bakhsh Singh has been found entitled to. Having purchased a 9 annas share in the property plaintiffs Nos. 2 to 4 are, in our opinion, entitled to the entire 5 annas 7 1/5 pies share that has been found to be the share of Ramanuj Bhan Bakhsh Singh in the property in dispute."

Their Lordships agree with this view.

In the result, the appeal fails except as regards the interest on Rs. 13,592 which their Lordships have held that the appellants are entitled to recover from the respondents in addition to Rs. 13,592. The decree of the High Court will be modified to this extent. As regards costs, their Lordships think the proper order should be that the appellants should pay the costs incurred by the respondents before the Board reduced by one-tenth of the same; the order as to costs in the Courts below will stand. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants: *A. J. Hunter & Co.*

Solicitors for Respondents: *Hy. S. L. Polak & Co.*

V.S. *Appeal dismissed but decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Arni Sri Vedapureswarar Temple by its Trustee, N. A. Subbaraya Chettiar. .. *Appellant**

v.

Sundaresa Gurukkal .. *Respondent.*

Temple—Suit against de facto *trustee—Decree passed—Binding nature.*

A decree can be validly passed against a *de facto* trustee of a temple who is in possession and management thereof so as to bind the temple.

Subramania v. *Srinivasa Rao*, A.I.R. 1940 Mad. 617, followed; and *Vedakkannu Nadar* v. *Ranganadha Mudaliar*, (1938) 2 M.L.J. 663, considered.

---

*S. A. No. 1087 of 1944. 27th August, 1945.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in A. S. No. 127 of 1943, preferred against the decree of the Court of the District Munsiff, Arni, in O. S. No. 632 of 1939.

T. L. Venkatarama Aiyar for Appellant.

P. C. Parthasarathy Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—There is a very short point in this appeal. There were two decrees passed in O. S. Nos. 129 of 1933 and 521 of 1935, against the appellant temple represented by its *de facto* trustee, and the temple by its *de jure* trustee filed O. S. No. 632 of 1939, out of which this appeal arises, for a declaration that those two decrees obtained by the first defendant against the *de facto* trustee did not bind the temple. Both the suits were for arrears of salary claimed by the archaka. The trial Court held that neither of those decrees was binding on the temple. The Subordinate Judge on appeal found that the decree in O. S. No. 521 of 1935 was binding, but with reference to the decree in O. S. No. 129 of 1933 he held that it was not binding, and the trustee has appealed against that part of his decree. The archaka has not appealed with regard to the other portions of the decree concerning O. S. No. 129 of 1933. The decision of this appeal turns upon the question whether a decree can be validly passed against a *de facto* trustee so as to bind the temple. The learned advocate for the appellant contends that a *de facto* trustee has no right of action on behalf of the temple and that he has no right to represent the trust and that consequently in law the decree passed in such circumstances is not binding on the trust, and in support of that proposition he relies on *Vedakkannu Nadar* v. *Ranganadha Mudaliar*[1] a decision of a Division Bench consisting of Venkatasubba Rao and Abdur Rahman, JJ. There it was held that :

> "A *de facto* trustee, as such, has no *locus standi* to maintain an action on behalf of the trust even if the action is taken to have been instituted for the benefit of the trust. His position is that of an intermeddler or a wrong doer (unless on the facts of each case a presumption can be raised in his favour of being a trustee *de jure*). He cannot confer any rights on himself by committing a wrong, although he may assume liability on account of his conduct. He is really no other than what is known to law as a trustee *de son tort*."

With this decision the learned Counsel for the respondent does not quarrel. The position here is entirely different. This is not a case where the *de facto* trustee tried to intermeddle. It was a case where an action was brought against the temple in respect of a certain claim and it has been found as a fact that the *de facto* trustee was not negligent in the defence of the suit. There is no case of fraud and there is no vitiating element so far as the operational effect of the decree is concerned. The learned Subordinate Judge referred to *Subramania* v. *Srinivasa Rao*[2] and argued therefrom that if a *de facto* trustee in possession and management of a temple can bring a suit for the recovery of the temple lands, as held in that decision, a decree could also be passed against the temple represented by him. I am of the opinion that that view is correct. In this view there is no reason for interference with the finding of the learned Subordinate Judge. The appeal is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

V. Pedda Rangaswami Shreshti by agent and power of attorney holder, V. Subba Rangayya Setty ... *Appellant**

v.

Sri Vishnu Nimbaker by agent and power of attorney holder C. Srinivasa Rao .. *Respondent.*

Crown Grants Act and Transfer of Property Act (IV of 1882), section 107—License for mining operations—Registration not necessary.

---

1. (1938) 2 M.L.J. 663.
2. A.I.R. 1940 Mad. 617.

* S. A. No. 1997 of 1944. 8th August, 1945.

Licenses for mining operations are in the nature of Crown grants and therefore need not be registered.

Kallingal Moosa Kutti v. *Secretary of State*, (1919) 37 M.L.J. 332 : I.L.R. 43 Mad. 65 and *The Secretary of State for India in Council* v. *Nistarini Annie Mitter*, (1926-27) I.L.R. 6 Pat. 446, followed.

Appeal against the decree of the District Court, Bellary, in A.S. No. 77 of 1943 preferred against the decree of the District Munsiff's Court of Bellary in O.S.No. 487 of 1942.

V. N. Shama Rao for Appellant.

V. S. Narasimhachar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant is the plaintiff and he had obtained a license from the Government to prospect for red oxide of iron in some lands in Janikunta village, Bellary taluk. His case was that the defendant also had obtained a license for prospecting the same ore in the vicinity and had carried away ore taken from the area for which he held a license. He sought to recover 65 tons of mineral ore alleged to have been so removed by the defendant from his field, and he prayed for an injunction restraining the defendant from entering the plaintiff's land or removing any material therefrom. The defendant pleaded that the suit was not maintainable, that the plaintiff had no title to the land and that he was not entitled to the injunction sought. The learned District Munsiff dealt with two issues, namely, whether the suit as framed was not maintainable and whether the plaintiff had title to the suit plot and if so, was not entitled to the injunction claimed for (issues 1 and 8). But he gave a finding on the first issue and without any specific findings on the eighth issue dismissed the suit. On appeal the learned District Judge also dismissed the suit agreeing with the District Munsif that the suit was not maintainable as the license granted in favour of the plaintiff was not registered and also on the ground that there was no prayer for possession. Hence this second appeal.

The original license was granted to the appellant on 28th May, 1941. A renewal of the same was applied for and it is clear from Ex. P-3 that it was granted on 29th May, 1942 for another year. The contention was that it is not valid as it was not registered. The lower appellate Court observed that no authority had been shown for the view that it need not be registered. The contention of the appellant was that under the Crown Grants Act, this need not be registered and registration was not compulsory. Reliance was placed upon section 107 of the Transfer of Property Act, which exempted these from registration. One authority of this Court and another of the Patna High Court have been cited for the appellant and they are to the effect that such licenses need not be registered as they are in the nature of a Crown grant (Vide *Kallingal Moosa Kutti* v. *Secretary of State*[1], and *The Secretary of State for India in Council* v. *Nistarini Annie Mitter*[2]). Both the Courts are therefore wrong in finding that the license shold be registered, and not being registered is not valid.

The next point urged was that the learned Judge was wrong in having found against the appellant with regard to his prayer for injunction. Both the Courts have proceeded on the basis that the plaintiff had admitted that he was not in possession of the suit land. No evidence was taken and there is nothing in the plaint to indicate that the plaintiff denied that he was in possession. All that was stated was that he did not commence the mining operations on account of some domestic difficulties. But nowhere was it stated that he was not in possession or that he did not get into the land which he was put in possession of. Further it is also significant that no plea was raised in the written statement that the plaintiff was not in possession, nor was any issue framed on that point. Therefore both the Courts were not justified, in the absence of definite issues, in having gone into that question without calling upon the parties to let in the necessary evidence.

1. (1919) 37 M.L.J. 332 : I.L.R. 43 Mad. 65. 2. (1926-27) I.L.R. 6 Pat. 446.

The lower Court has dealt with two other points. One of them was that the plaintiff had no title because a license in respect of the very same property had been subsequently given to the defendant. No evidence was let in except the two licenses and the license granted to the defendant does not include any land in the village in which the plaintiff has obtained his license. Consequently that finding of the learned District Munsiff cannot be allowed to stand and the dismissal of the suit on that ground has to be set aside. The decree of the lower appellate Court is set aside and the suit is remanded to the first Court for trial and disposal in the light of the findings and observations made above. The respondent will pay the costs of his appeal.

There will be a refund of the Court fee paid on the memorandum of second appeal. (No leave).

V.P.S. ——— *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Cherukuri Suranna and others .. *Appellants**

v.

Pedaverri Somanna .. *Respondent.*

Madras Debt Conciliation Act (XI of 1936), section 27 (1)—Execution petition—Limitation—Period occupied before Debt Conciliation Board in respect of the debt should be excluded.

An execution petition is a " proceeding before a civil Court for the recovery of a debt " within the meaning of section 27 (1) of the Madras Debt Conciliation Act and in calculating the period of limitation for the petition the time during which proceedings in respect of that debt were pending before the Debt Conciliation Board should be excluded.

Appeal against the order of the Court of the Subordinate Judge of Ellore, dated the 24th August, 1944 and made in A.S. No. 217 of 1944, preferred against the order of the Court of the District Munsiff of Kovvur, dated the 8th November, 1943 and made in E.P. No. 320 of 1943, in O.S. No. 7 of 1935.

T. S. Narasinga Rao for Appellants.

M. Rajagopalachari for Respondent.

The Court delivered the following

JUDGMENT.—The decree in O.S. No. 7 of 1935, District Munsiff's Court, Kovvur is dated the 7th April, 1938. The third and fourth judgment-debtors, who are two of the appellants here filed an application before the Debt Conciliation Board and in that application they acknowledged the debt. The application was dismissed by the Debt Conciliation Board on 9th August, 1941, and the execution petition out of which this civil miscellaneous second appeal arises was filed on 27th July, 1943. Both the Courts below have held that the period occupied by the proceedings before the Debt Conciliation Board, namely from 1st November, 1939 until 9th August, 1941, should be excluded. It is contended before me by the appellants that these orders are wrong.

Section 27 (1) of the Madras Debt Conciliation Act, 1936, says :

" In calculating the period of limitation for any suit filed in, or proceedings before, a civil Court for the recovery of a debt which was the subject of any proceedings under this Act the time during which such proceedings were pending as well as the time taken for the obtaining of certified copies of the order of the board shall be excluded."

Undoubtedly the execution petition filed on the 27th July, 1943 was a proceeding before a Civil Court for the recovery of a debt. Both the Courts below were right in holding that the period in question should be excluded.

The civil miscellaneous second appeal is dismissed with costs.

Leave refused.

K.S. ——— *Appeal dismissed.*

---

* A. A. A. O. No. 29 of 1945. 6th September, 1945.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

The Kaleswarar Mills, Ltd., Coimbatore, by agent, A.L.A.R. Kalai Raja Chettiar .. *Appellant.**

v.

A. P. Govindaswami Naicker and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *rules* 99 *and* 103—*Order dismissing decree-holder's applications for removal of obstruction and delivery of possession—Failure to file suit under Order* 21, *rule* 103 *within one year to establish the right to possession—Effect.*

The plaintiff who purchased various items of property from four brothers *A, B, C* and D, leased some of them to *A*. The plaintiff later on obtained a decree against *A* and his undivided sons for ejectment and when the plaintiff attempted to obtain delivery was met with obstruction from the sons of *D*. The applications filed by the plaintiff for removal of the obstruction and for delivery of possession were dismissed on 2nd August, 1934, on the ground that the sons of *D* were entitled to obstruct the plaintiff in their own right and that they were not in possession on behalf of the judgment debtors. An appeal against the order was dismissed as not maintainable on 9th September, 1935. In a suit filed on 20th January, 1942, for a declaration that the plaintiff was entitled to be put in possession of the properties without any obstruction from the defendants (the sons of all the vendors, *A, B, C* & *D*) and for recovery of possession and mesne profits,

Held, the order dismissing the applications for removal of the obstruction and for delivery of possession must be deemed to have been passed under Order 21, rule 99 of the Code of Civil Procedure, and as no suit had been brought by the plaintiff under Order 21, rule 103, to establish the plaintiff's right to possession within one year, the order upholding the right of the sons of *D* to possession had become final and conclusive.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in O. S. No. 35 of 1942.

K. Parasurama Aiyar for Appellant.

The Advocate-General (*K. Rajah Aiyar*), *S. D. Srinivasan, V. V. Raghavan* and *V. Seshadri* for Respondents.

The Judgment of the Court was delivered by

Rajamannar, J.—The plaintiff (appellant) is a limited company carrying on business at Coimbatore. On 27th January, 1930, the plaintiff company purchased several items of property including a rice mill, houses, a shop, machinery and agricultural land from four brothers, namely, Parasurama Naicker, Srinivasa Naicker, Murugesa Naicker and Manicka Naicker. Defendants 1 to 3 are the sons of Parasurama Naicker. Defendants 4 to 6 are the sons of Srinivasa Naicker. Defendants 7 and 8 are the sons of Murugesa Naicker. Two days after the execution of the sale deed a lease of four items out of the properties purchased was granted by the plaintiff to Parasurama Naicker on a monthly rental of Rs. 40. In 1932 the plaintiff filed O. S. No. 536 of 1932 in the Court of the District Munsiff at Arni, against Parasurama Naicker and his undivided sons, the present first and second defendants (the third defendant was not then born) to eject them from the properties leased and for recovery of arrears of rent. The plaintiff obtained a decree on 5th May, 1933, and the decree was confirmed on appeal on 26th October, 1933. The plaintiff then attempted to obtain delivery of the properties but was met with obstruction by the present fifth defendant who, it is common ground, was acting on behalf of the present seventh and eighth defendants. The plaintiff thereupon filed two applications, E. A. Nos. 2419 and 2160 of 1933, for removal of the obstruction and for delivery of possession. The applications were dismissed by the District Munsiff of Arni on 2nd August, 1934. He held that the present seventh and eighth defendants were entitled to obstruct the plaintiff in their own right and that they were not in possession on behalf of the judgment debtors in O. S. No. 536 of 1932. This order must be deemed to have been passed under Order 21, rule 99, of the Code of Civil Procedure. The plaintiff ill-advisedly, filed an appeal against this order and it was held, and rightly, that no appeal was maintainable. The appeal was

---

* Appeal No. 264 of 1943. 22nd August, 1945.

dismissed on 9th September, 1935. The plaintiff after the lapse of nearly seven years now brings a suit on the 20th January, 1942, for a declaration that it is entitled to be put in possession of the properties without any obstruction from the defendants and for recovery of possession and mesne profits.

It is also necessary to mention, because an argument was based on the fact, that the present defendants and their fathers brought a suit in 1933 (O.S. No. 6 of 1933) to obtain a declaration that the deed of sale dated the 27th January, 1930, in favour of the plaintiff was not intended to be a conveyance but was intended to be a deed of mortgage and that the mortgage itself had become discharged. This suit was eventually withdrawn on the 11th January, 1936.

The Subordinate Judge of Vellore who tried the suit dismissed it on the sole ground that the order passed by the District Munsiff of Arni on the 2nd August, 1934 upholding the right of the seventh and eighth defendants to possession of the properties now in dispute had become final and conclusive as no suit had been brought under Order 21, rule 103 of the Code of Civil Procedure to establish the right which the plaintiff now claims to possession of the properties. The plaintiff has filed the present appeal against the decree dismissing the suit.

When an application is made by the holder of a decree for possession of immoveable property under Order 21, rule 97, if the Court is satisfied that the resistance or obstruction was occasioned by a person claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. The party against whom an order is made under this rule may institute a suit to establish the right which he claims to present possession of the property; but subject to the result of such suit the order shall be conclusive. Once a year is allowed to elapse, the order operates as a conclusive adjudication of the right to the property. The decision reported in *Unni Moidin* v. *Pocker*[1] is a direct authority for that proposition. It was there held that the scope of a suit under rule 103 of Order 21, Civil Procedure Code is not the determination of the mere question of possession of the parties concerned but the establishment of the right or title by which the plaintiff claims the present possession of the property. It is not necessary to refer to any other decision save the decision reported in *Akkammal* v. *Komaraswami*[2], where, after a consideration of several decisions of this Court, it was pointed out that an order under Order 21, rule 63 is intended to be a summary declaration of a want of title in the objector, which declaration would amount to a final decision of the question between the parties, if the party aggrieved did not take steps by the institution of a suit to supersede it. Though that case dealt with the effect of Order 21, rule 63 on principle what was laid down in that decision would also govern the facts of the present case. The procedure indicated by the Code is the same and Order 21, rule 103 corresponds to Order 21, rule 63. The learned advocate for the appellant sought to escape the effect of these decisions by relying upon a distinction which he attempted to draw between them and cases where an auction purchaser in execution is prevented successfully by an obstructor who is not a party to the suit from obtaining possession and subsequently sues to establish his right to the property in question, basing his claim on a title different from the title obtained by him in the Court auction. He relied on the decision of the Calcutta High Court reported in *Ambica Charan Bakta* v. *Ram Prosad Chaterjee*[3]. On an examination of the facts of that case it will be found that it has no bearing on the facts of the present case. There the plaintiffs were landlords who had obtained a decree for arrears of rent and in execution of that decree had purchased the holding and taken possession. Later they were dispossessed by an order of Court passed at the instance of the defendants who claimed possession of the property on their own account and not on behalf of the judgment-debtors. The plaintiffs, presumably abandoning their rights under

1. (1920) 39 M.L.J. 626 : I.L.R. 44 Mad. 40.
2. (1942) 2 M.L.J. 315 : I.L.R. 1943 Mad. 227.
3. (1925) 30 C.W.N. 163.

their purchase in the execution sale, filed a suit in ejectment on the ground that their tenants had wrongfully parted with the holding and thereby contravened the provisions of the Bengal Tenancy Act and the transferees were liable to be ejected. The order passed by the Court in execution proceedings was sought to be relied on to defeat the plaintiffs' claim for recovery of possession. It was then pointed out that the causes of action for the two suits, that is, the one contemplated under Order 21, rule 103 and the suit as actually framed were quite different. The plaintiffs as auction purchasers might have been aggrieved by the adverse decision against them in the proceedings under Order 21, rule 100, but they had abandoned all their rights under the execution sale and they had instituted a suit relying on the right to which they became entitled under the Bengal Tenancy Act by reason of the action of their tenants. But in the present case before us, the title on which the plaintiff could rely to oust the seventh and eighth defendants from possession on the date of the adverse order in 1934 was in no way different from the title on which the present suit has been brought, that is, the title based on the sale deed of 1938.

It was contended that the withdrawal of O. S. No. 6 of 1933 relieved the appellant of the obligation of instituting a suit under Order 21, rule 103. There is no substance in this contention because there was no adjudication in that suit in favour of the appellant.

The position therefore is that on the 2nd August, 1934, an order was passed declaring the right of the seventh and eighth defendants to be in possession of the properties in suit and that order became conclusive as against the plaintiff by reason of its failure to institute a suit within one year from the date of that order. The result is that the plaintiff cannot obtain possession of the properties from the seventh and eighth defendants.

The next question is whether the plaintiff is entitled to a decree in ejectment against defendants 1 to 6. We think that the plaintiff cannot get a decree for possession against persons who have been found not to be in possession. It is not for us to determine the relative rights between defendants 1 to 6 and defendants 7 and 8. It is enough to dispose of the present appeal to say that the plaintiff in any event cannot get the relief of possession which it prays for. The plaintiff cannot get a decree for possession because the right of the 7th and 8th defendants to the possession of the properties has become conclusively established.

The appeal fails and is dismissed with costs—one set—to be divided as follows: One half to respondents 7 and 8 and the other half to be shared by the other respondents.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR.

Soore Venkatappayya ... *Appellant**

v.

Yalavarthi Venkatappayya and others ... *Respondents.*

Contract Act (IX of 1872), *section* 25 (3)—*Open payments insufficient to save limitation for a debt due on a promissory note—Debtor's offer before Debt Conciliation Board to pay seven annas in the rupee rejected by creditor—Creditor if can found a claim for the barred debt based on section* 25 (3) *of the Contract Act.*

Limitation Act (IX of 1908), *section* 20—*Amendment by Act XVI of* 1942 *long after suit—Cannot revive barred debt.*

In a suit brought in 1940, in respect of a debt due on a promissory note, dated 20th February, 1933, open payments made on 25th December, 1934, and 19th November, 1937, were insufficient to save limitation. On 9th August, 1939, the debtor applied to the Debt Conciliation Board and on the 1st June, 1940, made a statement undertaking to pay the creditors at seven annas in the rupee, if he was granted four months time. The plaintiff refused the offer. In the circumstances,

* S. A. No. 2093 of 1944. — 20th September, 1945.

Held, (i) the statement before the Board cannot be utilised to found a claim based on section 25 (3) of the Contract Act as an agreement would be essential to found such a claim;

(ii) The plaintiff cannot rely on Act XVI of 1942 which amended section 20 of the Limitation Act long after the institution of the suit, as it cannot have the result of reviving what was barred and unenforceable at that time.

Avudayammal v. *Ambasankar Davay*, (1944) 1 M.L.J. 347, followed.

Appeal against the decree of the District Court, Guntur, dated 1st March, 1944, in A. S. No. 79 of 1943, preferred against the decree of the Court of the District Munsiff, Narasaraopet, in O. S. No. 439 of 1940, dated 24th December, 1942.

N. Subramaniam, B. S. Ramachandra Rao and *D. V. Reddi Pantulu* for Appellant.

P. Satyanarayana Rao for 1st Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff whose legal representative is the appellant brought a suit in 1940 on a promissory note dated 20th February, 1933. Admittedly there were payments on the 25th December, 1934, and on the 19th November, 1937, but these are payments which according to the Law of Limitation at the time of the institution of the suit would not save the suit from being barred. On the 9th August, 1939, the defendant applied to the Debt Conciliation Board for relief and on the 1st June, 1940, he made a statement before the Board undertaking to pay seven creditors of whom the plaintiff was one at the rate of seven annas in the rupee if he was granted four months time from that day. The Advocate for the appellant contended in the Courts below and in this Court that this statement could be utilised to found a claim based on section 25, sub-section (3) of the Indian Contract Act. The short answer to this contention is that when the defendant made that offer, four of the seven creditors agreed to the proposal but the plaintiff admittedly did not agree because he was not willing to take seven annas in the rupee in full satisfaction. The four creditors in fact entered an agreement subsequently with the defendant in accordance with the undertaking referred to. After a definite refusal by the plaintiff of the offer by the defendant, it is impossible to understand how a claim under section 25, sub-section (3) can be made now in this suit. It is significant that even in the present suit the plaintiff claimed the full amount payable under the promissory note and in second appeal also he has claimed the full amount. No doubt he claims at seven annas in the rupee in the alternative but that does not make a difference in the legal position. Section 25, sub-section (3) is based on an agreement. The facts mentioned are conclusive to show that there was no agreement. In this view, all the decisions cited by the appellant's counsel in *Appa Rao* v. *Suryaprakasa Rao*[1], *Maniram Seth* v. *Seth Rupchand*[2], *Ram Bahadur Singh* v. *Damodar Prasad Singh*[3], *Prasanna Kumar* v. *Panaulla*[4] are of no assistance.

It was also attempted to be argued that the plaintiff is entitled to rely on Act XVI of 1942, which amended section 20 of the Limitation Act with the intention of superseding the law as laid down in *Rama Shah's case*[5]. This amendment was made long after the institution of the suit and it cannot have the result of reviving what was a barred and unenforceable claim at that time. I agree with respect with the decision of Patanjali Sastri, J., in *Avudayammal* v. *Ambasankar Davay*[6] that where the debt has become barred by limitation long before the amendment took effect, the amendment could not be relied upon to operate retrospectively so as to revive the barred debt. The lower Courts were right in holding that the suit is barred by limitation.

The second appeal is dismissed with costs.

(Leave refused).

K.S. *Appeal dismissed.*

---

1. (1899) 9 M.L.J. 330 : I.L.R. 23 Mad. 94.
2. (1906) 16 M.L.J. 300 : L.R. 33 I.A. 165 : I.L.R. 33 Cal. 1047 (P.C.).
3. A.I.R. 1921 Pat. 29.
4. A.I.R. 1923 Cal. 659.
5. (1940) 1 M.L.J. 895 : L.R. 67 I.A. 160 ; I.L.R. 1940 Lah. 470 (P.C.).
6. (1944) 1 M.L.J. 347.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Bhupatiraju Ramaraju .. *Accused.**

Evidence Act (I of 1872), section 114 and Penal Code (XLV of 1860), sections 457 and 380—Inference under section 114 of guilt of accused—When could be drawn—Born deaf and dumb mute accused found in possession of stolen articles obtained by house-breaking—Conviction on a presumption of guilt, not sustainable.

Where the only evidence against the accused—a born deaf and dumb mute—was that he was found in possession of articles stolen and obtained by house-breaking, an inference under section 114 of the Evidence Act, that the accused should have committed the offence of house-breaking and theft could be drawn only if he is not able to explain his possession when an explanation is asked for. As such an accused cannot be made either to understand what he was asked or to give an explanation, no inference under section 114 of the Evidence Act as to his guilt can be drawn. In such circumstances the conviction of such an accused on a presumption of guilt cannot be supported.

Case referred for the orders of the High Court under section 341 of the Code of Criminal Procedure, by the District Magistrate, West Godavari, in his letter dated 21st April, 1945.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—This is a reference to this Court by the District Magistrate of West Godavari. He has submitted the records in C. C. No. 475 of 1944 on the file of the Sub-Magistrate, Bhimavaram, under section 341 of the Code of Criminal Procedure for passing the necessary orders thereon. The accused in the case was a born deaf and dumb mute. He was charged under sections 457 and 380 of the Indian Penal Code for having broken open into a house and having committed theft of two brass vessels and a tiffin carrier. Under section 341 of the Code of Criminal Procedure if an accused person though not insane, cannot be made to understand the proceedings the Court may proceed with the inquiry or trial and in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction, the proceedings shall be forwarded to the High Court with a report of the circumstances of the case and the High Court shall pass thereon such orders as it thinks fit. In this case the Magistrate has found the accused guilty of the offence under sections 457 and 380 of the Indian Penal Code. There is no direct evidence of theft or house-breaking. The only evidence about the commission of the offences is that of P. W. 1. He had locked his house and gone one night and returned the next morning. The lock was found picked and a tiffin carrier and two brass vessels kept inside were missing. The evidence against the accused is that they were found in his possession. The police chased him and he dropped the vessels. That is all the evidence we have in this case. Even though there is no direct evidence of theft or of house-breaking and the only evidence is the possession by the accused of stolen articles shortly after the theft it will be open to the Court to draw a presumption that he must have been the thief *if he is not able to satisfactorily explain that possession.* If the theft could not have been committed without house-breaking it may be presumed he must have committed the house-breaking. That the articles were stolen and that they must have been obtained by house-breaking is clear from the evidence of P. W. 1. But that will only show that house-breaking and theft were committed. But the question is whether it is the accused that committed it. The only evidence against him was that he was in possession of them. An inference under section 114 of the Evidence Act could be drawn only if he is not able to explain his possession of them. It is not possible to communicate with the accused because he was born deaf and dumb and there is nothing to indicate that he was asked to explain or he explained. If he could not be made to understand what he was asked and if he could not give an explanation, no inference under section 114 can be drawn. It is only if an explanation

* Cr. R. C. No. 408 of 1945. 26th July, 1945.
(Case Referred No. 26 of 1945).

is called for and he fails to give a satisfactory one, such a presumption could be drawn. In these circumstances, I do not think, I will be justified in supporting the conviction. It is unnecessary to take further steps in this case in view of the fact that the accused has been in jail for three months. He is accordingly acquitted and set at liberty.

V.S. — *Reference answered and accused acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Munuswami Pillai .. *Petitioner**

v.

Doraikannu Ammal .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488—Order for maintenance in favour of wife—Husband and wife living together thereafter as such—Order, if and how far effective.

If subsequent to the passing of an order for maintenance in favour of the wife, the husband and wife happen to live as husband and wife, the order must be regarded as having become ineffective and inoperative. In such a case the question whether in fact they lived as husband and wife after the order for maintenance should be considered and decided.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Special First Class Magistrate of Saidapet, dated 18th October, 1944, in M. C. No. 37 of 1944.

A. Ramaswami Aiyangar for Petitioner.

V. C. Gopalan for Respondent.

The Court made the following

ORDER.—This is a petition to revise the order of the Special First Class Magistrate, Saidapet, enhancing the rate of maintenance awarded to the respondent, the wife of the petitioner, in a previous order of that Court on the ground that the life has become costlier and that she could not be able to live on the same rate of maintenance.

One of the objections raised by the petitioner (husband) is that he and his wife had lived together as husband and wife after the passing of the previous order and that therefore the original order of the Special First Class Magistrate has ceased to be effective it will have to be decided whether a claim for maintenance is sustainable on subsequent conduct. Of course, the wife pleaded that there was no real living as husband and wife, that, when she applied on a prior occasion for enhancement of the rate and when that petition came on for hearing, her husband, to escape the consequence of an enhancement of the rate, played a fraud on her stating that he would take her back and maintain her and she agreed not to press the petition. But in two months he made it impossible for her to live with him in the house by placing her in charge of his cattle while he himself was going and messing in his concubine's house and sleeping there while her mother was feeding her. The ruling in *Venkayya* v. *Raghavamma*[1] is to the effect that an order for maintenance in favour of a Hindu wife must be regarded as having become ineffective if, subsequent to the passing of the order, they happen to live as husband and wife. The question for consideration was stated at page 25 by His Lordship the Chief Justice as being whether a wife who has obtained a decree for maintenance could enforce it after having cohabited with her husband. Here the wife denied that she had cohabited with her husband and stated that she was only subjected to a ruse by her husband who offered to take her and made her live in his house but was not taken care of by him. She denies that she lived with her husband as husband and wife. If she had lived with her husband as husband and wife,

* Cr. R. C. No. 106 of 1945. 27th July, 1945.
(Cr. R. P. No. 101 of 1945).

1. (1941) 2 M.L.J. 263 : I.L.R. (1942) Mad. 24.

an order, whether a decree of a Civil Court or an order of a Criminal Court would cease to be operative and therefore she will have to base her claim on facts which happened subsequent to their living as husband and wife. The question has not been considered by the lower Court. The order of the lower Court is therefore set aside and the petition is remanded to the lower Court for considering this aspect of the case and disposing of the case in the light of these observations.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Chunduru Raja Rattamma .. *Petitioner**

v.

Chunduru Ramakrishna Rao (minor) and others .. *Respondents.*

Hindu Law—Widow—Declaration of her right to a sum in Court as her share—Application to draw the amount—Demand of security—Not proper in the absence of justifying circumstances.

Where in a partition suit a Hindu widow was declared entitled to a certain amount in Court being her share out of the sale proceeds of a certain family house, and there was no condition imposed on her right to or power over her share by either the preliminary or final decree, but when she applied to draw the money from Court, the Court insisted on her furnishing adequate security,

Held, that the order of the Court calling for security was neither correct nor proper in view of the absence of any special circumstances justifying the demand of security.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Bezwada, dated 30th October, 1944, in C. M. P. No. 924 of 1944 in O. S. No. 19 of 1941.

V. Rangachari for Petitioner.

M. Appa Rao for Respondents.

The Court delivered the following

JUDGMENT.—The order of the lower Court in this case is very cryptic. The petitioner is a Hindu widow and she was declared entitled in a partition suit to a sum of Rs. 4,896-2-7 being her share out of the sale proceeds of the house belonging to the family. Neither the preliminary decree nor the final decree imposed any condition on her right to or power over her share. It was not in any of those decrees directed that she should furnish any security in respect thereof. When however she applied for the issue of a cheque on the execution side, the learned Subordinate Judge directed her to draw the amount on furnishing proper security and the reason given by him in that order is that she is only a limited owner under the Hindu Law. By itself this is not a sufficient reason as would appear from the decisions in *Umayal Achi* v. *Lakshmi Achi*[1] and *Lingamma* v. *Venkayya*[2]. In the former case, the learned Chief Justice observed :

"A female heir only takes a limited interest, but she is entitled as of right to be placed in possession of her share. Should it transpire that she is dissipating moneys which have come to her and is thereby defeating the reversioner he can ask the Court to insist on security being furnished but such a position could only arise after partition."

In the latter case, following the decisions referred to therein of the Patna and Allahabad High Courts, the learned Judges found that security should not be taken from a Hindu widow of a separated Hindu merely on the ground that she is a limited owner. In the ordinary way a Hindu widow ought not to be called upon to give security at all. But there might be special circumstances for requiring a Hindu widow to give security. Reference was made to the decision of the Judicial Committee in *Vasanji Morarji* v. *Chandabibi*[3], where it was observed that the estate taken by a Hindu widow is not to be regarded as an ordinary life estate because in certain circumstances she can give an absolute and complete title and within the limits imposed upon her, the female holder has the most absolute powers of enjoy-

*C. R. P. No. 335 of 1945. 18th September, 1945.

1. (1944) 1 M.L.J. 70 : I.L.R. (1944) Mad. 556.
2. (1944) 1 M.L.J. 288.
3. (1915) 29 M.L.J. 130 : I.L.R. 37 All. 369 (379) (P.C.).

ment. On the other side, attention was drawn to *Arunachalam Chetti* v. *Krishnaveni Ammal*[1]. The facts of that case were peculiar. They are set out at page 701 of the report and in view of the special circumstances obtaining in that case, the learned Judge held that there was justification for asking the widow to furnish security.

The special circumstances relied upon in the present case are these. The petitioner's interests and attitude are hostile to those of her minor sons. She is living away from her husband and she is living an unchaste life. Taking all these facts to be true, although some of them are not admitted, it is impossible to hold that individually or cumulatively they establish that the widow is likely to waste or squander away her share of the sale proceeds of the house. In some of the cases bearing upon the point, the nearest reversioners have come forward and asked for some restrictions to be placed upon the powers of disposal of the widow alleging that there was ground for apprehending that the property would be wasted. In the present case, as pointed out on behalf of the petitioner, the respondent is not even the nearest reversioner. The petitioner was sued as the legal representative of her deceased son and in that way it was a case of inheritance rather than of survivorship. Lastly, with regard to the alleged hostile attitude, there is the circumstance that the adult son is not only living with her but is practically sailing with her in this case. Having regard to all these considerations, I am not satisfied that the order of the learned Subordinate Judge calling for security before the petitioner withdraws the amount is either correct or proper.

The petition is allowed and the order of the lower Court is set aside and the application filed in the lower Court for the issue of a cheque is granted. No order as to costs.

K.C. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

N. M. P. L. Palaniappa Chettiar Estate represented by first executor, Chokkalingam Chettiar .. *Appellant**

v.

V. N. S. Ramaswami Naidu and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 3—*Right to relief under the Act—Estate of a deceased person.*

There is no provision of the Agriculturists' Relief Act under which such an impersonal entity as an estate of a deceased person can claim relief. The estate is not a person and if it is not a person, it cannot be an agriculturist by the terms of the definition in section 3 of the Act. The question of assessment of the estate is a matter of no relevance for determining the right to relief under the Act.

Appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in O. S. No. 29 of 1943.

R. Rangachari for Appellant.

K. V. Ramachandra Aiyar and *T. R. Ramachandran* for Respondents.

The Court delivered the following

JUDGMENT.—It seems to us that the question of the assessment of the estate is a matter of no relevance for determining the right to relief under Madras Act IV of 1938. The estate is not a person and if it is not a person, it cannot be an agriculturist by the terms of the definition in section 3 of the Act. We are not here concerned with the question of a claim by beneficiaries under a trust to relief under the Act in respect of liabilities imposed on them through the trustee. Nor are we concerned with a decree against the executors personally. The decree is only against the estate in the hands of the executors and there is no provision of the

1. (1941) 1 M.L.J. 697.

* Appeal No. 350 of 1944. 10th August, 1945.

Act under which such an impersonal entity as an estate can claim relief. In fact the estate is a charitable estate and would seem to be expressly excluded by the terms of section 3 (1) of the Act. The appeal is dismissed with costs of respondents 1 to 3.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Chakrapu Anjaneyulu and others .. *Appellants**

v.

Kalakoti Saravayya and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 8, Explanation—Two debts due by same debtors to two different creditors—Discharge by joint mortgage executed in favour of the two creditors—Mortgage if can be scaled down as renewal of separate debts to each of the joint mortgagees.

Where a debt due to *A* and another debt due by the same debtors to *B*, have been discharged by a joint mortgage executed by the debtors in favour of *A* and *B* there is no renewal because the creditor is not the same. The two joint mortgagees cannot be deemed to be the same creditors as either or both of the two individual creditors acting separately and independently of each other. The mortgage cannot be treated as if it were two debts each of which could be scaled down separately.

Swami Setti v. *Lakshmireddi*, (1944) 2 M.L.J. 142 and *Balireddi Vissanna* alias *Viswanadham* v. *Venkayala Appalanarasayya*, (1944) 2 M.L.J. 390 (1), applied.

Appeals against the order of the District Court, West Godavari, Ellore, dated the 15th March, 1944, and made in O. P. No. 42 of 1943.

D. Suryaprakasa Rao for Appellants.

G. Chandrasekhara Sastri for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—These two appeals arise out of an application to declare the amount due under a mortgage, applying Madras Act IV of 1938 and the rules framed thereunder. The mortgage in question is Ex. D-1 dated 20th November, 1936, for a sum of Rs. 6,680 in favour of two persons each of whom was previously entitled to amounts from the debtors which were equalised and clubbed together in the joint transaction. There is nothing in the recitals of the mortgage Ex. D-1 to indicate that the debts due to each of the two mortgagees separately were to be kept separate under the mortgage contract.

The position therefore is that a debt due to *A* and another debt due by the same debtors to *B* have been discharged by a joint mortgage executed by the debtors in favour of *A* and *B*. The lower Court has treated the mortgage as if it were not one debt but two debts and has scaled down each portion separately. C. M. A. No. 411 of 1944 is an appeal by the mortgagors in respect of the disallowance of their claim to relief having regard to the antecedent history of the portion of the mortgage debt due to second mortgagee. C.M.A. No. 568 of 1944 is an appeal by the first mortgagee against the relief given to the mortgagors in respect of the antecedent history of the portion of the debt due to him.

Quite apart from the question whether there is any renewal at all by the joint mortgage, it is plain that the contention of the appellants in C. M. A. No. 411 of 1944 must fail because the antecedent promissory note which is discharged by the mortgage is not in favour of the second mortgagee but in favour of the second mortgagee's adoptive mother and obviously one cannot go into the question whether she was a *benamidar* for her husband. There can be no renewal of an anterior debt in favour of a different creditor.

The appeal of the first mortgagee raises the basic question whether there can be any renewal at all in the present circumstance. It has been repeatedly held that when a debt due to *A* and *B* is discharged by the execution of another document in favour of *A* alone, there is no renewal because the creditors are not the same—

* A. A. O. Nos. 411 and 568 of 1944. 10th August, 1945.

vide *Swami Setti* v. *Lakshmireddi*[1] and *Balireddi Vissanna alias Viswanadham* v. *Venkayala Appalanarasayya*[2]. It was held by one of us in an unreported case—C. R. P. No. 2050 of 1940—that when a promissory note in favour of *A* is discharged by another promissory note in favour of *A* and *B*, there is no renewal because the creditor is not the same. It seems to us that the same principle must apply here. No doubt this is a clubbing of two debts each due to one of the joint mortgagees at the time of the execution of the joint mortgage; but in substance what we have to decide is whether the discharge of a debt in favour of *A* by the execution of a new document in favour of *A* and *B* is a renewal and whether the discharge of a debt in favour of *B* by the execution of a new document in favour of *A* and *B* is a renewal. It seems to us that the two joint creditors cannot be deemed to be the same creditors as either or both of the two individual creditors acting separately and independently of each other. In this view we dismiss C. M. A. No. 411 of 1944 with costs and we allow C. M. A. No. 568 of 1944 with costs and there will be a declaration that the amount due on the mortgage is the principal sum of Rs. 6,680 with interest at 5 per cent. from 20th November, 1936, up to the 22nd March, 1938, and thereafter at 6 per cent. per annum, the payment of Rs. 400 being adjusted to principal as on the 1st April, 1937.

K.S. ——— *C. M. A. No.* 411 *of* 1944 *dismissed and* *C. M. A. No.* 568 *of* 1944 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Achanta Venkata Purna Sivaramayya and others .. *Appellants**

v.

Manne Venkayya and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 56—Right of marshalling—Purchaser undertaking to relieve certain items of mortgaged property from the encumbrance—Failure to do so—Right to demand item sold to him being sold last.

The mortgagors of the suit properties sold one of the two items to a certain purchaser and it was expressly recited in the sale deed that "it has been settled that the aforesaid sale consideration shall be paid by you immediately after the registration of this document, towards the debt due in respect of the mortgage dated 14th December, 1919." In a suit on the mortgage the purchaser claimed the right to have the item sold to him sold last, stating he had discharged the mortgage by payment. Though finding against the payment pleaded, the lower appellate Court directed the particular item to be sold last. On appeal against such a direction,

Held, that as between the mortgagor and purchaser, the latter undertook to discharge a previous encumbrance on one of the properties and failed to do so, he could not insist on the burden of the mortgage which subsisted only by reason of his default being thrown in the first instance on properties which were intended under the contract to be relieved from the obligation of the encumbrance. In the circumstances neither law nor equity justified the direction made by the lower court.

Appeal against the decree of the District Court of West Godavari at Ellore in A. S. No. 101 of 1943, preferred against the decree of the Court of the Subordinate Judge of Narsapur in O. S. No. 48 of 1942.

V. Parthasarathi for Appellants.

M. Appa Rao and *Ch. Raghava Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This appeal has been preferred by defendants 1 to 8 and it relates to a mortgage executed by defendants 1 and 2 and their deceased father in favour of the 13th defendant for a sum of Rs. 3,000 on 14th December, 1919. The plaintiff now stands in the shoes of the mortgagee. In 1930 the mortgagors sold one of the two items mortgaged to the 9th defendant under Ex. P-4, and he sold it to the 10th defendant who gifted it to the 14th defendant. The sale to the 9th defendant was for the purpose of discharging the mortgage debt of Rs. 3,000, and it is expressly recited in the deed that "it has been settled that the aforesaid sale

---

1. (1944) 2 M.L.J. 142. 2. (1944) 2 M.L.J. 390 (1).

* S.A. No. 1519 of 1944. 3rd August, 1945.

consideration shall be paid by you, immediately after the registration of this document, towards the debt due in respect of the mortgage dated 14th December, 1919." A debt due on another mortgage is also mentioned in the sale deed as an item that the 9th defendant undertook to pay off; but nothing appears from the records as to what happened to that mortgage. The 9th defendant claimed the right to have item (1) sold to him, sold last stating that he had discharged the mortgage by payment to the 13th defendant. The Subordinate Judge was not prepared to record any definite finding if the amount had or had not been paid by the 9th defendant, but proceeded to consider the question whether it was an open payment, assuming that the amount had been paid. In paragraph 11 of his judgment, he does not wish to record a finding; but, in paragraph 12 he says:

"I, therefore, hold that though the payment of Rs. 3,000 by the 9th defendant is true, it has not been proved to be an open payment."

Finally, while decreeing the suit, he gave a direction that item (1) should be sold last.

On appeal by defendants 1 to 8, the District Judge found against the payment pleaded, in these words:

"These are some of the circumstances on the strength of which I am inclined to agree with the appellant's contention that the 9th defendant did not pay the purchase money under Ex. P-4."

But, still he allowed the direction in the decree about item (1) being sold last to stand, as he was of the opinion that there was no "contract to the contrary" made out within the meaning of section 56 of the Transfer of Property Act, which provides for marshalling.

The question in this appeal is whether this part of the decree in favour of the 9th defendant, in whose shoes stands the 14th defendant, that item (1) should be sold last is justified and warranted. We are governed in this matter by section 56 of the Transfer of Property Act which confers a statutory right on the purchaser to insist on the mortgage debt being satisfied out of the property not sold to him, in the absence of a contract to the contrary. The contract to the contrary need not be express; it may be implied; that is, if, from the facts and surrounding circumstances, an inference could be drawn negativing the right of marshalling, effect must be given to that inference, even though the contract does not say in so many words that there shall be no such right in the purchaser. From the circumstance that the 9th defendant undertook in the sale deed to discharge this particular encumbrance—in fact the sale to him was for the very purpose that the other properties subject to the mortgage should be freed from the encumbrance—how could we say that he could claim marshalling and thus throw the burden of the mortgage primarily on the properties not sold to him. I am not able to see why we should not hold that there was a contract to the contrary. In *Muhammad Abbas* v. *Muhammad Hamid*[1], where a question arose as regards the right to contribution by purchasers of properties mortgaged, it was held that the plaintiffs, who undertook to discharge the encumbrance that existed on the two properties and were left in possession of funds for that purpose, could not claim contribution from the defendants who purchased one of the properties as free from encumbrances. Marshalling which is enunciated in section 56 is the converse of contribution and the ground on which the Privy Council in *Ganeshi Lal* v. *Charan Singh*[2] distinguished *Muhammad Abbas* v. *Muhammad Hamid*[1] from the facts before them was that, in the case with which they had to deal, the appellants who claimed the right to contribution, were not parties to the contract between the mortgagor and the purchaser Shersingh, the ancestor of the respondents. In a case where, as between the mortgagors and the purchaser the latter undertook to discharge a previous encumbrance on one of the properties and failed to do so, he cannot insist on the burden of the mortgage which subsists only by reason of his default, being thrown in the first instance on properties which were intended under the contract to be relieved

1. (1912) 9 All.L.J. 499. I.L.R. 52 All. 358 (P.C.).
2. (1930) 59 M.L.J. 177 : L.R. 57 I.A. 189 :

from the obligation of the encumbrance. In my view, a case has been made out even for the appellants insisting that item (1) should be sold first; but that is not what is wanted now. All that we are concerned with is whether there should be any direction that the 9th defendant's item (1) should be sold last. Neither law nor equity justifies such a direction.

The second appeal is allowed with costs right through.

K.C. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AYYAR.

Tammina Mutyalu .. *Appellant.**

Explosive Substances Act (VI of 1908), sections 2, 4 and 5—Accused found in possession of yellow phosphorus in water in a bottle in its natural form—No inflammable substance found along with it likely to cause explosion—Intention to cause an explosion not evidenced—Conviction for offence punishable under section 5—Sustainability.

When following certain fires in a particular locality the house of the accused was searched, a bottle containing yellow phosphorus in water was found along with certain other substances like petrol, denatured spirit, lead chromate, aluminium powder and ferric oxide, he was prosecuted and convicted for an offence punishable under section 5 of the Explosive Substances Act. On revision,

Held, that in the natural form in which phosphorus at the time of the search was found in water in a bottle, it was not an explosive as defined by section 2 of the Explosive Substances Act, and that the accused was not guilty of the offence with which he was charged, as possession of it by itself would not be chargeable under the Act. It is only an incendiary. If it had been used or found in a state in which it was used or adapted for exploding a bomb, then it could be said that it would be an explosive substance as defined in the Explosive Substances Act.

Appeal against the judgment of the Assistant Sessions Judge of the Court of Session of the Kistna Division at Bezwada in case No. 4 of the Calendar for 1945.

B. Jagannadha Das and *C. V. Dikshatulu* for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The appellant has been convicted by the learned Sessions Judge of Kistna for an offence punishable under section 5 of Act VI of 1908 and sentenced to transportation for 5 years. He was charged also for having committed an offence under section 4 of that Act but he has been acquitted in respect of the same.

The Reserve Police Force which was temporarily located at Bezwada was housed in temporary huts by the side of the Bandar canal. On 15th November, 1942, even before the huts were completed, a corner in the line caught fire. On pulling down the palmyra leaves from the roof, two cotton balls were noticed each ½ an inch in diameter. The balls were suspected to be phosphorus balls. On 6th December, 1942, when a sentry was keeping watch, he saw fire breaking out from the eastern side of the police line at 5-30 p.m. At 3 P.M., on 7th December, 1942, the house of the accused was searched in which several articles were found, M. Os. 1 to 17, *viz.*, a Congress flag, an earthern tub, a dirty black cotton, a cigarette tin containing yellow powder, another containing grey powder and a third containing chocolate powder, a cigar lighter with a rope foil, an empty tin, an empty green bottle, a white bottle containing white tablets, a bottle containing petrol, a bottle of denatured spirit, a big jar containing a liquid like varnish, a sandal wood oil tin, a book of "Swatantragarjana," rules and objects of Andhra Congress Socialist Party, and two books of "Bhinna Margamulu" of Andhra Rashtra Congress Sangham. Among the articles recovered was also a blue bottle with yellow phosphorus in the water inside. The accused was not there nor was he found. A charge-sheet under section 436, Indian Penal Code, Rule 35 (4) read with rule (*a*) of the same rule and section 121 of the Defence of India Rules, and sections 3, 4 and 5 of the Explosive Substances Act read with Ordinances II and III of 1942, was filed. Sanction was accorded by the Government to the prosecution filed under sections 4 and 5 of the Explosive Substances Act. He was prosecuted for the charge framed only under Act VI of 1908, for possessing yellow

* Crl. App. No. 322 of 1945. 3rd August, 1945.

phosphorus, and he has been convicted for an offence punishable under section 5 of that Act. On 19th October, 1944, the accused surrendered himself before the Joint Magistrate, Bezwada. As pointed out by the learned Assistant Sessions Judge, the Committing Magistrate had indicated that though the police tried to connect the accused with the fire in the police line, the prosecution failed to connect him with the offence of setting fire to the police huts. The accused admitted that he had all articles mentioned above except the bottle containing phosphorus in water, which he said was not his. But he said he had a smaller bottle in which he had kept some scent. There was evidence that when the house of the accused was searched there were mediators present then and when the articles were seized a mahazar was also written. From the evidence of the witnesses present, it is clear that all the articles, M. Os. 1 to 17 were in his house and that M. O. 8 was one of them.

The main question for consideration is whether the yellow phosphorus which was said to have been found in M. O. 8 is an explosive substance, the possession of which is an offence under section 5 of Act VI of 1908 which remarks :

> " Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with transportation for a term which may extend to fourteen years, to which fine may be added, or with imprisonment for a term which may extend to five years, to which fine may be added."

The prosecution has to prove that the accused had in his possession any explosive substance under circumstances which lead to a reasonable suspicion that he is not having it for a lawful object. As already stated the Committing Magistrate himself has found that it has not been proved that the accused had anything to do with the fire in the police lines. In the charge, it is stated that the explosive substances in his possession were phosphorus, petrol, denatured spirit, lead chromate, aluminium powder and ferric oxide. The appellant was a carpenter and there is nothing surprising in his having had petrol or denatured spirit, lead chromate, aluminium powders and ferric oxide for his profession. Therefore it cannot be said that, from the fact that he had them he must have had an unlawful intention or that there were circumstances to indicate that he was not having them for a lawful object. It is only in respect of the yellow phosphorus it is urged that its possession would make it an offence punishable under section 5. Yellow phosphorus by itself is not an explosive substance, and under section 2 of the Act, the expression, " explosive substance " is defined as follows :

> " In this Act the expression 'explosive substance' shall be deemed to include any materials for making any explosive substance ; also any apparatus, machine, implement or material used, or intended to be used, or adapted for causing, or aiding in causing any explosion in or with any explosive substance ; also any part of any such apparatus, machine or implement."

It is stated in this case that it is a material used or intended to be used or adapted for causing or aiding in causing any explosion in or with explosive substances. It is not shown that this phosphorus was used or was intended to be used for causing or aiding in causing any explosion. P. W. 11 who is the officiating Inspector of Explosives states that the yellow phosphorus found in M. O. 8 was an incendiary material which spontaneously burns when exposed to air, that by itself it is not an explosive substance as defined under Explosive Rules. He said that under the Explosive Substances Act this phosphorus substance in conjunction with other explosive material may form a component part of an explosive contrivance. He added that the phosphorus may serve as the initiator to cause explosion of that explosive contrivance. He also stated that he did not find from the 9 material objects filed in this case that any combination of the same would form explosives. He further stated that he did not find any materials with relation to which any of the M. Os. including phosphorus can be regarded as explosives. He admitted that petrol was used for removing dust from furniture. As a matter of fact in Ex. E-1, the report submitted by the witness, he has not stated that any articles sent to him inclusive of the phosphorus which he destroyed were explosive in character. Nor

has he stated that phosphorus falls within the category of explosive substances as defined in Act III of 1908. The learned Judge, after pointing out that the testimony of P.W. 11, the expert may not help one to decide whether the material "phosphorus" would fall clearly within the first or the second category of "Explosive substance" as defined under section 2 of the Act, says that any doubt on the question must be held to have been set at rest by G. O. Ms. No. 4316 Home Department, dated 20th November, 1942. It is a notification under the Defence of India Rules and has nothing to do with the Explosives Act and it says that His Excellency the Governor of Madras prohibits the possession, carrying, use, sale or other disposal by any person of yellow phosphorus, in the Province of Madras, except under, and in accordance with the terms and conditions of a license granted by the Provincial Government or the Commissioner of Police in the City of Madras and the District Magistrate concerned elsewhere. It no doubt prohibits the possession of yellow phosphorus without license. It is not for contravention of this notification issued under the Defence of India Rules the accused has been prosecuted and fined. In another G. O. Ex. H-2 it is mentioned that sulpher, sulphides of arsenic, red phosphorus and yellow phosphorus are substances, which are capable of being used in the manufacture of bombs. After quoting G. O. 387 Ex. H-2, the learned Judge observes, "By virtue of such notification red phosphorus and yellow phosphorus" are declared as explosive substances. In these two G. Os. all that is stated is that they can be used in the manufacture of explosives and therefore it is necessary to restrict the possession of such articles by individuals; but it cannot amount to a notification under section 17 of the Explosives Act, 1884. Further this notification was under the Defence of India Rules and not under section 17 of the Explosives Act. All that is urged before me is whether this phosphorus can be said to be a material used or intended to be used or adapted for causing, or aiding in causing any explosion in or with any explosive substance. There is absolutely no evidence that the yellow phosphorus as found in the bottle had been used or was intended to be used in causing any explosion in or with any explosive substance, because it was found in water in the bottle in its ordinary state. It is only an incendiary. It can be used in a bomb which is an explosive substance as an incendiary, but there is nothing to show that this phosphorus as found was adapted for causing or aiding in causing any explosion in or with any explosive substance. If it had been used or was found in a state in which it was used or adapted for exploding a bomb, then it could be said that it would be an explosive substance as defined in section 4 of the Explosive Substances Act. In the natural form in which it was found at the time of the search in water in a bottle, it is not an explosive substance as defined in Act VI of 1908. I therefore find that the accused is not guilty of the offence with which he is charged. Possession of it might be an offence under the Defence of India Rules by virtue of the notifications, Exs. H-1 and H-2, but it is not the subject of the present charge.

Consequently, the appeal is allowed, the conviction and sentence are set aside and the accused acquitted.

K.C. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Ramachandra Prabhu and another .. *Appellants**

v.

Mahadevi *alias* Kunhi Thamburatti styled as Manaviyathan Valia Thamburatti of Kozhikkot Ambadi Kovilagam and another .. *Respondents.*

Landlord and tenant—Denial of landlord's title in the reply to the landlord's notice—Works out a forfeiture of tenancy —Second appeal—Raising of question not raised in the written statement.

---

*S.A. Nos. 1308 and 1324 of 1944 and A.A.A.O. No. 228 of 1944. 2nd August, 1945.

In order to work out a forfeiture of tenancy in India it is not necessary that the denial by a tenant of the landlord's title should be embodied in a judicial proceeding. Where there was a denial of the landlord's title in the reply sent by the tenant to the notice issued by the landlord,

Held, that such denial was enough to work out a forfeiture.

Rachotappa Iswarappa v. *Konher Annarao*, (1934) I.L.R. 59 Bom. 194; *Maharajah of Jeypore* v. *Rukmini Pattamahdevi*, (1918) 36 M.L.J. 543 : L.R. 46 I.A. 109 : I.L.R. 42 Mad. 589 (P.C.) and *Padmanabhayya* v. *Ranga*, (1910) 20 M.L.J. 930 : I.L.R. 34 Mad. 161, referred to.

A pure question of law can be raised in second appeal even though it was not pleaded in the written statement but which was allowed to be raised in the Courts below and which does not involve any further investigation of facts.

Appeals against the decree of the Court of the Subordinate Judge, South Malabar, at Calicut in A. S. No. 68 of 1943, preferred against the decree of the Court of the District Munsiff, Calicut, in O. S. No. 594 of 1939, etc.

A. Narayana Pai for Appellants.

P. Govinda Menon, V. P. Gopalan Nambiar, C. K. Viswanatha Aiyar and *K. Kuttikrishna Menon* for Respondents.

The Court delivered the following

JUDGMENT.—S. A. Nos. 1308 and 1324 of 1944 and C. M. S. A. No. 228 of 1944.

S. A. No. 1308 of 1944 has been preferred by the defendants 12 and 13 and S. A. No. 1324 of 1944 by the second defendant. The second defendant stands in the shoes of the original lessee Raricha Mooppan. Defendants 12 and 13 hold subordinate interests carved out from the original lease Ex. P-6, having become entitled thereto under several transactions ; in fact, they are sub-kanomdars, the original kanom having been created in favour of one Venkataramayyar by the tenant under a deed dated 10th January, 1908.

The suit was instituted by the jenmis for recovery of possession and for arrears of rent due. The recovery of possession was sought on the ground that the tenant denied the landlord's title and there was in consequence a forfeiture of the tenancy. The District Munsiff held that the lease evidenced by Ex. P-6 dated 3rd December, 1898, was governed by the Transfer of Property Act and that, as there was no notice from the landlord showing his intention to terminate the lease which is required under section 111 (*g*), no forfeiture was incurred, and therefore he gave a decree only for rent. But, on appeal, the Subordinate Judge decreed the eviction finding that forfeiture has been worked out by the notice Ex. P-8, by the tenant in answer to the landlord's notice Ex. P-7. He took the view that the lease was not governed by the Transfer of Property Act, having been granted for agricultural purposes.

The second defendant, who represents the interest of the original tenants, and defendants 12 and 13 who are sub-kanomdars from him have preferred these two appeals. Mr. K. Kuttikrishna Menon stated that he was not pressing his second appeal, S. A. No. 1324 of 1944. This means that the original tenant or the person standing in his shoes is prepared to abide by the decree of the lower appellate Court holding that a forfeiture has been incurred. If the tenancy itself is forfeited in this manner, whether persons in the position of defendants 12 and 13 who hold derivative interests under the tenant by way of kanom or assignment, can be heard to say that their interests are not affected will depend upon the principle of law embodied in section 115 of the Transfer of Property Act, though the Act will not in terms apply to this case in view of the finding of the lower Court. But it is unnecessary to pursue this point further as the objection was not seriously pressed by Mr. Govinda Menon.

The only question that remains is whether the denial has worked out forfeiture, as held by the Subordinate Judge. It was argued for the appellants that the denial in Ex. P-8 did not work out any such forfeiture because it cannot be said to be a denial of the landlord's title in any matter of "record" as the word has been understood and interpreted by the Judicial Committee of the Privy Council. It is clear law that, in cases in which the Transfer of Property Act does not apply, clear and unambiguous denial of the landlord's title would be enough to work out a

forfeiture and to support a suit in ejectment of the tenant and that it is not necessary for the landlord to do something showing an intention to determine the lease as the result of the denial. There can be no doubt that Ex. P-8 contains and constitutes such a denial. Is it necessary that it should be contained in some "record" such as a judicial proceeding? It is possible having regard to some antique technicalities peculiar to Real Property law that in England in ancient times some qualification about the place where the denial is to be found was considered necessary. Whether it should be insisted on at the present day when most of these technicalities have been wiped away is itself a matter of doubt; but whatever that may be, I see no ground, and there is really no authority, for holding in India that, before there can be a forfeiture, the denial of the landlord's title to work out forfeiture of the tenancy must be embodied in a judicial proceeding. I am not prepared to read Broomfield J.'s observations in *Rachotappa Ishwarappa* v. *Konher Annarao*[1] as imposing any such condition, or *Maharaja of Jeypore* v. *Rukmini Pattamahdevi*[2] as involving any such position. In the Privy Council case, denial before the suit was not a denial of the landlord's title but a denial of the terms of tenancy as set up by the landlord. The denial here relied on as working out a forfeiture was a denial of the title itself. *Padmanabhayya* v. *Ranga*[3] was a case where the denial was a notice before the institution of the suit and this was held enough to work out the forfeiture. In the later decision in *Korapalu* v. *Narayana*[4] this particular question was not considered, though criticism was directed by Sadasiva Aiyar, J., against the view that in such a case the landlord had to elect between one of two courses.

It was objected that it was not open to the tenant to raise the question now as they had not in their written statement pleaded anything as to Ex. P-6 entailing forfeiture of tenancy. The objection is however groundless not merely because both the Courts have allowed the tenant to raise the point about the insufficiency of Ex. P-6 to bring about any such result but also because it is a pure question of law which involves no further investigation of facts.

The result is that both the second appeals Nos. 1308 and 1324 of 1944 are dismissed with costs of the first respondent. C.M.S.A. No. 228 which arises out of the renewal application must also be dismissed, but without any order as to costs. No leave.

V.P.S. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

The Province of Madras .. *Appellant**

v.

C. A. Galia Kotwala & Co., Ltd. .. *Respondent.*

Sale of Goods Act (III of 1930), section 42—Acceptance of goods—What would amount to—Order for supply of hose similar in quality to a prior supply—Delivery made in seven instalments—Purchaser intimated at each delivery that goods would not be taken back unless informed of non-approval within three days of delivery—Goods supplied in the first four instalments paid for—Subsequent demand by purchaser for replacement of goods supplied on the ground of defective quality—Suit to recover money paid as price for the goods—Maintainability—Reasonable time for rejection.

On the 22nd April, 1942, an order for the supply of 10,000 feet of cotton hose, similar in quality to a previous supply was placed by the plaintiff with the defendant firm who accepting the same intimated that the goods would be supplied "part by part". The defendant firm supplied the whole lot in seven instalments spread over the period between the 28th April, 1942, and the 3rd June, 1942. Each instalment was accompanied by a letter from the defendant firm stating that if the goods were not approved, it must be informed of the fact within three days, otherwise it would not

---

1. (1934) I.L.R. 59 Bom. 194 at 211.
2. (1918) 36 M.L.J. 543 : L.R. 46 I.A. 109 : I.L.R. 42 Mad. 589 (P.C.).
3. (1910) 20 M.L.J. 930 : I.L.R. 34 Mad. 161.
4. (1912) 25 M.L.J. 315 : I.L.R. 38 Mad. 445.

* O.S.A. No. 62 of 1944. 6th August, 1945.

take back the goods. By the 15th May, 1942, 7,986 feet of hose had been supplied and paid for. The balance was supplied but not paid for. On the 7th July, 1942, the plaintiff wrote to the defendant firm complaining of the defective quality of the goods supplied and demanded that the goods delivered should be replaced by those of the same quality as supplied on the prior occasion. The defendant maintained that the goods were of the contract quality and that they had been unequivocally accepted. In a suit to recover from the defendant moneys which the plaintiff had paid for the goods supplied in which the defendant counter-claimed for the balance of the price for goods delivered and not paid for,

Held, that the plaintiff's claim failed because (*i*) it accepted without reservation the goods and (*ii*) even if there was no acceptance, the rejection of the goods took place after a reasonable time had elapsed for their inspection and examination and that the defendant's counter-claim should be decreed.

On appeal from the judgment and decree of the Honourable Mr. Justice Chandrasekhara Aiyar, dated 11th October, 1944 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 254 of 1943.

The Advocate-General (*K. Rajah Aiyar*) instructed by the Crown Solicitor for Appellant.

T. K. Rajagopala Aiyangar for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—The plaintiff in this action and the appellant in the appeal is the Government of Madras. It sued on the Original Side of this Court to recover from the respondent, a limited liability company trading in fire hose pipe, the sum of Rs. 24,982-6-0, moneys which it had paid to the defendant for goods supplied, the allegation being that the goods had proved to be of inferior quality. The contract was for the supply of 10,000 feet of hose. The hose was delivered in instalments between the 28th April, 1942 and the 3rd June, 1942. By the 8th May, 1942, the defendant had delivered 7,986 feet and had received payment in full for this quantity by the 15th May, 1942. The balance of the contract was delivered in three instalments between the 19th May, 1942 and the 3rd June, 1942, but these goods were not paid for. The Rs. 24,982-6-0 represented the price of the 7,986 feet supplied up to the 8th May, 1942. The defendant brought a counter-claim for the price of the goods delivered and not paid for, the amount being Rs. 6,559-13-0. The learned trial Judge (Chandrasekhara Aiyar, J.) held that the goods supplied were of inferior quality and consequently the plaintiff could have rejected them, but it had in fact accepted them ; in any event the right of inspection and rejection was not exercised within a reasonable time. The plaintiff included in the plaint an alternative plea for damages for breach of warranty of quality. The learned Judge was of the opinion that there was no evidence on the record on which such damages could be assessed and he rejected this plea also. As he held that the plaintiff had accepted the goods, he gave the defendant a decree for the amount of the counter-claim.

It is necessary to set out the facts in detail. On the 13th January, 1942, the defendant wrote to the Special A.R.P. Officer a letter stating that it was in a position to supply best quality of canvas hose according to a sample sent with the letter at Rs. 1-13-6 per foot, F.O.R., Madras, delivery to be from its ex-Bombay stock, subject to prior sale. On the 17th January, the defendant wrote a letter to the Deputy Commissioner, Madras Fire Services, stating that the hose would be supplied in cotton canvas ply of 18 or 24 and that the company was in a position to supply about 1,000 feet of hose pipe from its ex-Bombay stock, subject to prior sale. On the 20th January, the Deputy Commissioner placed an order with the defendant for 500 feet of 24 ply canvas hose for the purpose of testing it. On the 26th January, the defendant delivered 310 feet of this hose and stated that the balance of the 500 feet would be delivered shortly. On the 18th February, the Deputy Commissioner wrote cancelling the order so far as it concerned the balance of 190 feet. Between the 26th January and the 18th February it had been ascertained that the hose leaked and was therefore unsuitable for the purposes of the Madras Fire Services. On the 26th March, the defendant wrote stating that they could supply canvas hose, 2½ inches by 24 ply, which was of superior quality.

On the 11th April, the Deputy Commissioner sent 100 feet of the 310 feet of hose which was supplied on the 26th January, to the Buckingham and Carnatic Mills in order that it might be ascertained whether it would be possible to "rubberize" the inside of the pipe, and it was discovered that this could be done and, when done, the rubberization made the hose serviceable.

On the 21st April, Mr. Gray, the Chief Fire Officer, had an interview with Mr. P. S. Krishnamurthy, the defendant's manager. According to Mr. Gray, he disclosed to Mr. Krishnamurthy that it was possible to render the hose serviceable by rubberization inside the pipe and that he intended to place an order for hose of the same quality as that of the 310 feet supplied on the 26th January. According to Mr. Krishnamurthy nothing was said with regard to the matter of rubberization. It is unnecessary for the purposes of this case to decide whose recollection is the better. For the purposes of this case we will assume that the matter of rubberization was discusssed at this interview and that Mr. Krishnamurthy fully understood that the plaintiff intended to have all the hose supplied treated in this way.

On the same day the defendant wrote to the Assistant Commissioner saying that the company could supply any quantity of 2½ inches cotton hose, 24 ply, from its Bombay stock at Rs. 2-14-0 per foot, the quality to be similar to that first supplied. On the following day the Deputy Commissioner wrote to the defendant as follows :

"Referring to your representative's letter, dated 21st April, 1942 (Sri P.S. Krishnamurthy), kindly arrange to deliver urgently at the Fire Service Headquarters, 10,000 feet of cotton 24 ply hose at Rs. 2-14-0 per foot quality similar to your last supply. This order may be treated as very urgent."

The price to be paid was higher than that charged for the 310 feet, but what is important is that the quality was to be the same. On the 28th April, the defendant wrote to the Deputy Commissioner thanking him for the order for 10,000 feet of hose and sent to him as the first instalment of the order 450 feet. The letter stated that the balance of the contract would be executed "part by part" as early as possible. As we have indicated, the 10,000 feet of hose was supplied in seven instalments, spread over the period from the 28th April, 1942 to the 3rd June, 1942.

In the Court below it was not suggested that the letter of the 22nd April embodied an entire contract, but in this Court the point has been taken. We consider that it is a fallacious one. The request for "urgent delivery" did not in itself visualise delivery in one lot, and the defendant's letter of the 28th April shows that delivery could not be given in one lot. It is manifest that the plaintiff was quite willing to take delivery in instalments, provided that the deliveries were made as soon as possible. In this connection we may draw attention to a letter of the 23rd April, written by the defendant's Madras office to the Bombay office in which it was stated that instructions had been received to confirm the order for 10,000 feet of cotton hose, 2½ inches X 24 ply, for supply "in parts" at Rs. 2-14-0 per foot. It is also significant that the plaintiff paid in full for the first two instalments on the 7th May, and the next two instalments on the 15th May, and that each instalment was accompanied by a letter from the defendant company stating that if the goods were not approved, it must be informed of the fact within three days, otherwise it would not take the goods back.

On the 19th May the Deputy Commissioner sent to the Buckingham and Carnatic Mills for rubberization 8,069 feet of the hose of which he had received delivery. On the 3rd June the managing agents of the Buckingham and Carnatic Mills wrote to the Deputy Commissioner the following letter:

"We find that the 8,069 feet of hose delivered to us for rubberizing on 21st May, 1942, is of inferior construction to the original 100 feet length sent on 17th April, 1942. The following is a comparison:

	Weft threads per inch.	Warp Counts.	Weft Counts.
Original 100 feet	12	8/19s	24/19s
Present supplies	13	4/14-1/2s	24/30s

If the present supplies are supposed to be of the same quality as the first sample, you should have a substantial claim on the manufacturers in respect of the lower quality now supplied."

The present supply is a much lighter hose and causes much difficulty in processing and successful results cannot be guaranteed. The first sample was of excellent quality.

We suggest that you inspect the hose at the mills and decide whether the results so far as obtained are likely to be satisfactory. In the meantime, we are processing no more."

On the 7th July the Director, Fire Services, wrote to the defendant drawing attention to the defective quality and stating that the whole of the consignments had been found to be unsatisfactory. He went on to ask that the hose delivered should be replaced by hose of the same quality as that of the original 310 feet. No reply was received to this letter, nor to further letters on the subject written on the 20th July, 5th August, and 18th November, 1942 and the 4th January, 1943 and the 4th February, 1943. On the 5th April, 1943, the Government Solicitor wrote to the defendant and to this a reply was sent on the 14th April. In the reply the defendant averred that the goods were of the contract quality and that the goods supplied had been unequivocally accepted. Attention was drawn to the statement in each of the letters accompanying delivery to the effect that only three days would be allowed for rejection. It was in these circumstances that the suit was filed.

There was much argument in the Court below and there has been some argument in this Court on the question whether there is a difference between canvas hose and cotton hose. The 310 feet supplied on the 26th January was described as canvas hose. The letter of the Deputy Commissioner of the 22nd April placing the order for 10,000 feet spoke of cotton hose. The Court is not called upon to decide whether there is or there is not a difference between canvas hose and cotton hose. What the plaintiff stipulated for and what the defendant undertook to supply was hose of the same quality as that of the 310 feet. If the deliveries under the contract in suit were not of that quality, then the defendant was in breach and the plaintiff had its remedy, provided that the goods were not accepted or were rejected within a reasonable time.

The evidence of Mr. Hill, the rubber expert, and of Mr. Molyneaux, the textile expert, of the Buckingham and Carnatic Mills, which has been accepted by Chandrasekhara Aiyar, J., and is accepted by us, shows that the goods supplied were inferior to the sample, and the plaintiff would have been justified in rejecting them. It has been argued by the learned Advocate-General that the contract implied that the hose should be fitted for rubberization by the process employed by the Buckingham and Carnatic Mills. This is going much too far. The record does not lend support for the suggestion that Mr. Krishnamurthy agreed to supply hose which was fitted for that process or for any other process. It transpired, however, in the course of the examination of the plaintiff's witnesses that the hose in fact supplied was capable of satisfactory rubberization by another process, that employed by a factory in Trivandrum; but we need not pursue this matter further because there was no warranty that the hose would be suitable for rubberization. What we have to consider is whether the plaintiff accepted the goods without reservation and, if not, whether it rejected them within a reasonable time.

Section 42 of the Sale of Goods Act says that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does an act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them. There was here no intimation on the buyer's part that he had accepted the goods; but did the buyer do something in relation to them which was inconsistent with the ownership of the seller, and/or did he intimate his rejection of them after the lapse of a reasonable time?

We agree with Chandrasekhara Aiyar, J., that the plaintiff did accept the goods delivered under this contract. As we have pointed out, each instalment was accompanied by a letter requiring rejection, in case of rejection, to be intimated within three days. This was not done. The plaintiff paid in full for the first four instalments soon after the goods had been received and the fact that the

plaintiff sent this large quantity of the goods to the Buckingham and Carnatic Mills for rubberization in itself is inconsistent with the ownership of the sellers. If a small quantity had been sent for testing purposes the position might perhaps have been different.

Mr. Molyneaux's evidence shows that the defect in quality could have been ascertained by looking at the goods. But, instead of having them examined by an expert as and when they were delivered, the plaintiff allowed them to accumulate until a greater part of the contract had been fulfilled and paid for them. We consider that the evidence amply justifies the finding that the plaintiff did in fact accept the goods. There was, no doubt, lack of care on the part of the plaintiff's servants. If they had taken proper steps, they would have quickly ascertained that the goods were of inferior quality ; but no such steps were taken.

Even if it cannot be said that there was acceptance of the goods, the failure on the part of the plaintiff to reject them until the 7th July, 1942, puts the plaintiff out of Court. We will assume that the plaintiff was acting within its rights in having an examination of the goods made at the Buckingham and Carnatic Mills ; but that right would avail the plaintiff of nothing unless it was promptly exercised. The goods were not sent for processing to the Buckingham and Carnatic Mills until three weeks after the receipt of the first instalment and eleven days after the receipt of the fourth instalment, all of which had been paid for. The defendant had, without protest, insisted on the right of rejection being exercised within three days. The rejection did not take place until the 7th July, 1942 and therefore not in our judgment within a reasonable time.

We hold that the plaintiff's claim fails for these reasons :—(*i*) It accepted without reservation the goods and (*ii*) even if there was no acceptance, the rejection of the goods took place after a reasonable time had elapsed for their inspection and examination.

The learned Advocate-General has referred to several reported cases and has laid emphasis on the judgment in *Heilbutt* v. *Hickson*[1]. The facts of all the cases quoted are entirely different from the facts of this case. The law which applies to the facts here is clearly stated in section 42 of the Sale of Goods Act.

The learned Advocate-General has very properly not pressed the alternative claim for damages for breach of warranty. As the learned Judge has pointed out, there is no evidence on the record on which such damages could be assessed.

On our findings the defendant was rightly granted a decree for the price of the goods delivered and unpaid for.

The appeal is dismissed with costs.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Mir Hussain Ali .. *Appellant**

v.

Mir Baquir Ali .. *Respondent.*

Limitation Act (IX of 1908), section 10 and Schedule I, Articles 62, 89, 120 and 123—Applicability—Sale of estate of deceased Mahomedan—Proceeds entrusted to defendant—One heir claiming his share—Starting point of limitation—Knowledge whether material—Express trust whether created.

The estate of a Mahomedan who died in 1917 included a casuarina plantation which was sold in 1921 in accordance with the wishes of the majority of the heirs. The person who sold the property acting with the consent of the majority of the heirs handed over the sale proceeds to the defendant with instructions to distribute the money among the heirs in accordance with their respective interests. The defendant paid some of them but he did not pay the plaintiff. The plaintiff who stated that he did not become aware until 1940 of the fact that the money was in the hands of the defendant, sued to recover his share in the sale proceeds.

---

1. (1872) L.R. 7 C.P. 438.

*L. P. A. No. 19 of 1945. 31st July, 1945.

Held, that the receipt of the sale proceeds by the defendant for the purpose of distribution among the heirs did not constitute an express trust and that section 10 of the Limitation Act was not applicable to the case.

Vairavan Chetti v. *Chettichi Achi*, (1937) M.W.N. 368, distinguished.

Held, further, that the suit was governed by article 62 and not by articles 89, 120 or 123 of the Limitation Act and that the suit was barred by limitation. In such a case the starting point of limitation is the date when the defendant received the money and the date of the plaintiff's knowledge of it is immaterial.

Ramaseshayya v. *Tripurasundari Cotton Press, Bezwada*, (1925) 50 M.L.J. 520 : I.L.R. 49 Mad. 468 (F.B.), considered.

Appeal under clause 15 of the Letters Patent against the judgment and decree of Byers, J., dated 16th January, 1945, and passed in C. C. C. A. No. 27 of 1944, preferred to the High Court against the decree of the City Civil Court, Madras, in O. S. No. 1279 of 1940.

The Advocate-General (*K. Rajah Aiyar*) for Appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit filed by the respondent against the appellant in the City Civil Court. The trial Court dismissed the action on the ground that the relief sought was barred by the law of limitation. On appeal Byers, J., held that section 10 of the Indian Limitation Act applied and consequently the plaint had been presented in time. The appeal has been filed under clause 15 of the Letters Patent from the judgment of the learned Judge.

The plaintiff is the son of one Haji Mir Abbas Ali, who died in 1917. His heirs, of whom the plaintiff is of course, one, numbered sixteen. His estate included a casuarina plantation which was sold in 1921, in accordance with the wishes of the majority of the heirs, by the plaintiff's step-brother, Haji Mir Moosa Raza Ali. The sale realised Rs. 3,000. Apparently with the consent of the majority of the heirs Raza Ali handed over the sale proceeds to the defendant with instructions to distribute the money amongst the heirs in accordance with their respective interests. The defendant paid some of them but he did not pay the plaintiff. The plaintiff says, and it has been so found by Byers, J., that he did not become aware until 1940 of the fact that the money was in the hands of the defendant. The suit was filed on the 19th November, 1940, to recover from the defendant Rs. 1,290, of which Rs. 250 represented the plaintiff's share in the Rs. 3,000 and the balance interest on the Rs. 250, calculated up to date of suit. Certain receipts given by the defendant to Raza Ali show that the money was given to him on the 1st August, 1921 and that it was in fact paid to him to be distributed amongst the heirs.

The main question in the trial Court and before Byers, J., was whether the payment of the Rs. 3,000 to the defendant and his acceptance of the money for purposes of distribution amongst the heirs created an express trust. If it did, no question of limitation could arise. The City Civil Judge was of the opinion that no trust had been created, but Byers, J., disagreed.

It is common ground that section 10 of the Indian Limitation Act only applies where there is an express trust. There is a judgment of a Division Bench of this Court to this effect; see *Chandra Kesavalu Chetti* v. *Perumal Chettiar*[1]. The wording of section 10 leaves no room for doubt that it only operates when the suit is against a person in whom property has become *vested* in trust for a specific purpose or against his legal representatives or assigns (not being assigns for valuable consideration) and the purpose of the suit is to follow in his or their hands the property vested or the proceeds thereof or to obtain an account of the property or proceeds.

Section 5 of the Indian Trusts Act, 1882, which also has important bearing reads as follows :

---

1. (1939) 1 M.L.J. 820.

"No trust in relation to immoveable property is valid, unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee.

No trust in relation to moveable property is valid unless declared as aforesaid, or unless the ownership of the property is transferred to the trustee. These rules do not apply where they would operate so as to effectuate a fraud."

There is no document declaratory of the alleged trust and there is no question of fraud in this case. The learned counsel for the defendant says that the ownership of the Rs. 3,000 was never transferred to him and the money never became vested in him within the meaning of section 10 of the Limitation Act. We consider that this argument is sound. The person who handed the money over to the defendant was not its owner. He merely held it on behalf of the estate of Abbas Ali. As we have already indicated, the sale took place according to the directions of the majority of the heirs. They had no authority in law to direct the sale, but nothing turns on that. As Raza Ali, who sold the property, was not the owner of the sale proceeds he could convey no title to the defendant and therefore there could be no transfer of ownership as required by section 5 of the Indian Trusts Act. The defendant undertook the task of distribution, but he had no legal title to the money and at the most he could only be regarded as an administrator *de son tort* in this connection. It follows that the learned Judge was wrong in applying section 10 of the Limitation Act.

The learned counsel for the plaintiff has on this question relied on the judgment of Varadachariar, J., in *Vairavan Chetti* v. *Chettichi Achi*[1], but when the facts of that case are examined it is clear that it has no application. There a person entered into an arrangement with another (the defendant) under which the latter was to receive a sum of Rs. 4,000 and out of it pay off the debts of the former. The debtor drew a hundi in favour of the defendant, who cashed it. This money was the property of the debtor and he vested it in the defendant for a specific purpose. It was held that there was here a trust. That case differs from the present case in that the money did not belong to the person who handed it over to the defendant in the present suit and there was no vesting of it in him.

We have now to decide which article of the Limitation Act applies to the present case. The learned counsel for the defendant says that the proper article is either article 62 or article 123. On the other hand, for the plaintiff it is said that the case either falls within article 89 or article 120. It is obvious that the case does not fall within article 123 or article 89. The real question is whether article 62 or article 120 applies. Article 123 only applies to a suit which is against an executor or administrator by some person legally charged with the duty of distributing the estate, as the Privy Council had occasion to point in *Ghulam Mohamed* v. *Ghulam Hussain*[2]. This is not a suit for the administration of an estate, nor is it against a person legally charged with the duty of distributing any portion of it. Article 89 only applies to a suit by a principal against his agent. The defendant was never the agent of the plaintiff. Agency implies a contractual relationship. There was no contractual relationship between the plaintiff and the defendant. In fact the plaintiff's case is that he knew nothing of the defendant until 1940.

Article 120 can only be applied when there is no other article having application. Therefore the question resolves itself into this: Does article 62 cover this case? If it does, article 120 cannot be applied. Article 62 prescribes a period of three years' limitation for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use and the period starts on the date when the money is received by the defendant. Now it is quite clear here that the defendant received the Rs. 3,000 for the use of the heirs of the deceased of whom the plaintiff is one and therefore he received part of that sum for the plaintiff's use. The plaintiff says, however, that time only began to run when he became

---

1. (1937) M.W.N. 368.
2. (1931) 62 M.L.J. 371 : L.R. 59 I.A. 74 : I.L.R. 54 All. 93 (P.C.).

aware of the fact that the defendant held this money. That was in 1940 and the suit was filed in the same year.

There is an observation to be found in the judgment of Coutts-Trotter, C.J., in *Ramaseshayya* v. *Tripurasundari Cotton Press, Bezwada*,[1] to the effect that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it. That case was decided by a Full Bench and the other members of the Court concurred in the judgment delivered by the learned Chief Justice. If for the purposes of that case it was necessary for the Court to consider and decide the question whether knowledge was a factor we should be bound to follow the judgment of Coutts-Trotter, C.J., but it is obvious that it was not necessary for the Court to consider this question and the passage in the judgment on which the plaintiff relies can only be regarded as constituting an *obiter dictum*. The judgment gives no indication on what the assertion was made and nothing has been said in the course of the arguments which convinces us that it is right. As the Privy Council has on more than one occasion had to point out, the Court is not concerned with the hardship of the case. It must have regard only to the wording of the statute. There is nothing in article 62 which even implies that knowledge is a factor. It says in the plainest possible language that time shall begin to run when the defendant has received the money. In our judgment article 62 clearly applies to this case and the suit was not brought within the three years allowed.

The result is that the appeal is allowed and the suit is dismissed with costs throughout.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Khan Bahadur Chowakkaran Keloth Mammad Keyi Sahib, Karnavan and Manager of his tarwad at Tellicherry .. *Appellant**

v.

The Cannanore Municipal Council through Commissioner (Executive authority), Municipal Office, Cannanore .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 83 (1) (c) (as amended by Madras Act XXI of 1939)—House leased to Municipal Council for the purpose of a school—Assessment to property tax after the Amending Act XXI of 1939—Legality.

In consequence of the amendment of section 83 (1) (*c*) of the Madras District Municipalities Act by the Madras Act XXI of 1939, a Municipal Council amended the assessment register of the Municipality on the 30th September, 1939, by inserting therein an entry with regard to a house leased to the Municipal Council for the purpose of a school and on the 2nd October, 1939, issued a demand notice for the payment of the tax in respect of the half year commencing 1st April, 1939. In a suit by the owner of the house concerned for a declaration that the levy and collection of tax in pursuance of such a demand was illegal and for recovery of the sum collected with interest,

Held, that the executive authority had on the day when it amended the assessment register, the right to make the amendment under rule 8, sub-rule (2) of the Taxation and Finance Rules set forth in the IV schedule of the Act and by virtue of that sub-rule, the amendment had to be regarded as having taken effect on the 1st day of that half year. This provision is mandatory. The proviso to sub-rule (2) did not apply to the case because no notice of demand for that half year had previously been issued. It followed that the demand made by the Municipal Council was valid.

Appeal against the decree passed by Chandrasekhara Aiyar, J., dated 29th March, 1944, in S. A. No. 945 of 1943, preferred against the decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 302 of 1942 (O. S. No. 601 of 1940, District Munsiff's Court, Cannanore).

D. Ramaswami Aiyangar for Appellant.

K. Subramanyam for Respondent.

---

1. (1925) 50 M.L.J. 520 : I.L.R. 49 Mad. 468 (F.B.).

* L.P.A. No. 30 of 1944. 18th January, 1945.

The Judgment of the Court was delivered by

The Chief Justice.—The appellant is the owner of a house in Cannanore. At all times material it was leased to the Cannanore Municipal Council for the purpose of a school. Up to the 29th August, 1939, the building was exempt from property tax by reason of section 83 (1) (*c*) of the Madras District Municipalities Act, 1920. On that date, the section was amended by the Madras City Municipal, District Municipalities and Local Boards (Amendment) Act, 1939 (Madras Act XXI of 1939) which inserted a proviso to the effect that nothing contained in clauses (*a*), (*c*) and (*e*) of section 83 should be deemed to exempt from property tax a building for which rent was payable by the person or persons using it for the purposes referred to in these clauses.

As the house had become liable to assessment, for the purpose of Municipal taxation, the Cannanore Municipal Council amended the assessment register by inserting therein an entry with regard to this house, and on the 2nd October, 1939, it issued a demand notice for the payment of the tax in respect of the half-year commencing 1st April, 1939. The appellant considered that this demand was unlawful and consequently he filed a suit in the Court of the District Munsiff of Cannanore for declaration that the levy was illegal and for the recovery of the sum exacted with interest. The amount was Rs. 35-1-8. The Municipal Council raised a plea of jurisdiction. The District Munsiff held that the tax was leviable, but he considered that the suit was not maintainable because the plaintiff had not taken advantage of the remedy provided in the rules framed under the Act for redress in matters of taxation. On appeal the Subordinate Judge agreed with the District Munsiff that the tax was leviable in respect of the half-year commencing the 1st April, 1939, but he refrained from entering upon a discussion of the question of the maintainability of the suit. The appellant then appealed to this Court. His appeal was heard by Chandrasekhara Aiyar, J., who agreed with the Courts below on the question of the validity of the demand. The learned Judge also considered the question of the maintainability of the suit and decided it against the appellant. This appeal is from the judgment of Chandrasekhara Aiyar, J.

We consider that the Court below were right in holding that the tax was payable in respect of the half-year. Rule 8 of the Taxation and Finance Rules set forth in the Fourth schedule to the Act reads as follows:

"(1) The assessment books shall be completely revised by the executive authority once in every five years.

(2) The executive authority may amend the assessment books at any time between one general revision and another by inserting therein or removing therefrom any property or by altering the valuation of any property or the amount of tax. Such amendment shall be deemed to have taken effect on the first day of the half-year in which it is made:

Provided that when the amendment is made in any half-year after the demand notice for that half-year has been issued, it shall have effect only from the succeeding half-year."

As we have mentioned, the assessment register was amended on the 30th September, 1939, by the inclusion of an entry with regard to this house. The executive authority had then the right to make this amendment and by virtue of sub-rule (2), the amendment had to be regarded as having taken effect on the first day of the half-year. This provision is mandatory. The proviso to sub-rule (2) does not apply, because no notice of demand for that half-year had previously been issued. It follows that the demand made by the Municipal Council was valid.

As the plea that the assessment was unlawful fails it is unnecessary to consider whether the suit was maintainable and we leave that question open.

The appeal is dismissed with costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Vemulapalli Satyanarayana and others .. *Appellants**

v.

Vetrapu Kajireddi and others .. *Respondents.*

Limitation Act (IX of 1908), Article 182 (5) and Civil Procedure Code (V of 1908), Order 21, rules 11 and 22—Execution petition filed with wrong number of the suit—Application not in accordance with law—Prayer for issue of notice under Order 21, rule 22—Step-in-aid of execution.

Rule 11 of Order 21, Civil Procedure Code, is mandatory. The number of the suit is one of the particulars which the rule states the application "shall" contain. Hence, an execution petition which gives an incorrect number of the suit, is not one filed in accordance with law, and the mistake in the number of the suit is fatal.

G. R. Naidu v. *Venkataswami Naidu*, (1939) 2 M.L.J. 864 ; *Govind Prasad* v. *Pawankumar*, (1943) 2 M.L.J. 121 : L.R. 70 I.A. 83 : I.L.R. (1943) Nag. 669 (P.C.) and *Seshagiri Rao* v. *Subbarami Reddi*, (1945) 1 M.L.J. 270, followed.

The prayer in an execution petition for the issue of a notice under rule 22 of Order 21, Civil Procedure Code, is a step-in-aid of execution.

Pachiappa Achari v. *Poojali Seenan*, (1905) I.L.R. 28 Mad. 557 and *Kamakshi Pillai* v. *Ramaswami Pillai*, (1908) 18 M.L.J. 14, followed.

Appeal against the order of the District Court of Kistna at Masulipatam dated 17th December, 1943, and made in E. P. No. 38 of 1943 in O. S. No. 62 of 1932.

K. Umamaheswaram for Appellants.

V. Govindarajachari, *K. Mangachari* and *N. Suryanarayana* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether the execution of a decree obtained by the appellants in Original Suit No. 62 of 1932 in the Court of the District Judge of Kistna in barred by the law of limitation. The District Judge has held that it is. The decree was passed against ten of the fifteen defendants, namely, against defendants 1 to 9 and 15. We agree with the District Judge that the decree is barred against defendants 1, 3 to 5, 7 to 9 and 15. Whether it is barred against the second and sixth defendants will depend on the result of a further inquiry which we propose to order the District Judge to make.

The decree was passed on the 29th January, 1935, for the payment of Rs. 6,181-4-0 with interest and costs. On the 27th January, 1938, the decree-holders filed a petition asking for the execution of the decree by the arrest of the judgment-debtors. As the application was made two years after the date of the decree the decree-holders included in their petition a prayer for the issue of notice under the provisions of Order 21, rule 22 of the Code of Civil Procedure. Unfortunately in the execution petition the suit was described as being Original Suit No. 62 of 1931, whereas the correct number was Original Suit No. 62 of 1932. As the names of the parties did not tally with the names of the parties in Original Suit No. 62 of 1931, the petition was returned to the decree-holders with these remarks :

"Original Suit No. 62 of 1931 quoted in the execution petition is not correct as the names of the parties do not tally. For other particulars, decree copy has not been filed.

To state how this is an application in accordance with law when the amount due under the decree on the date of filing of the execution petition was not noted."

This order was passed on the 1st February, 1938. The petition for execution was returned to the decree-holders, who represented it on the 11th February, 1938, with a prayer that a week's time might be granted for the filing of a copy of the decree. On the 14th February, 1938, time was granted until the 21st February, 1938. The petition was represented on the 23rd February, 1938, with a prayer that a further week's time should be granted. As a petition for the extension of time had not been filed the District Judge, on the 26th February, 1938, passed an order formally dismissing the petition for execution. This order was indorsed on the petition itself.

---

* A. A. O. No. 325 of 1944. 2nd August, 1945.

On the 24th July, 1941, the decree-holders filed another petition for execution, and this petition was returned for the furnishing of further necessary particulars. It was dismissed on the 4th September, 1941, for default in furnishing the particulars. An application for review of the dismissal order was dismissed on the 20th February, 1942.

The application which has given rise to this appeal was filed on the 14th November, 1942. The decree-holders maintained that the petition of the 27th January, 1938, was in accordance with law and that in any event their prayer for notice under Order 21, rule 22, was a step-in-aid of execution, which in itself operated to save limitation. They also averred that the second and sixth defendants had on the 14th November, 1939, in proceedings before a Debt Conciliation Board acknowledged their indebtedness under the decree. The District Judge held that the first petition for execution was not in accordance with law and therefore could not be relied upon to save limitation. He also rejected the argument based on the prayer for notice under Order 21, rule 22, on the ground that as the petition for execution was not in accordance with law, the case did not fulfil the conditions embodied in article 182 (5) of the Limitation Act. With regard to the alleged acknowledgment before the Debt Conciliation Board by the second and sixth defendants the District Judge said that this, if made, was made more than three years after the date of the decree and therefore did not help the decree-holders. The appeal challenges the validity of all these findings.

In support of the objection to the decision of the District Judge that the application for execution was not in accordance with law, the learned advocate for the appellants has referred to an observation of a Judge of the Allahabad High Court sitting alone made in *Raja Ram Gopal* v. *Harish Chandra*[1], where he said that the omission to mention the number of the suit or the date of the decree did not by themselves render the application for execution defective. We find ourselves unable to agree that the omission to mention the number of the suit is a defect which can be overlooked. In holding that the mistake in the number of the suit was fatal, the District Judge in the present case relied on the judgment of Wadsworth, J., in *G. R. Naidu* v. *Venkataswami Naidu*[2]. There an application for the execution of the decree was returned for rectification of the suit number and the execution petition was not presented within the time allowed. Wadsworth, J., was of the opinion that the petition was not in accordance with law because of the requirements of Order 21, rule 11 of the Code of Civil Procedure. That rule states that the application "shall" contain certain specified particulars one of which is the number of the suit. Moreover, in his judgment, common sense indicated that an essential feature of an execution petition was that it should be identifiable with the suit under which it was filed. We consider that this is the correct view of the law.

In *Govind Prasad* v. *Pawankumar*[3] the Privy Council drew a distinction between rules in Order 21 which are merely permissive and those which are mandatory. The question was later discussed by a Full Bench of this Court in *Seshagiri Rao* v. *Subbarami Reddi*[4], and in accordance with the judgment of the Privy Council it was held that rule 14 is merely permissive unlike rules 11, 12 and 13 which are mandatory. These two judgments clearly govern this case; and consequently we hold that the District Judge was right in finding that the petition of the 27th January, 1938, was not in accordance with law.

The prayer contained in the petition of the 27th January, 1938, for the issue of a notice under rule 22 of Order 21 was a step-in-aid of execution. There are two decisions of this Court directly in point *Pachiappa Achali* v. *Poojali Seenan*[5] and *Kamakshi Pillai* v. *Ramaswami Pillai*[6]. In each of these cases the decision was by a Division Bench and the decision was that the prayer for the issue of the notice

---

1. A.I.R. 1936 All. 17.
2. (1939) 2 M.L.J. 864.
3. (1943) 2 M.L.J. 121 : L.R. 70 I.A. 83 : I.L.R. (1943) Nag. 669 (P.C.).
4. (1945) 1 M.L.J. 270.
5. (1905) I.L.R. 28 Mad. 557.
6. (1908) 18 M.L.J. 14.

was a step-in-aid of execution. The same opinion was expressed by a Full Bench of the Calcutta High Court in *Gopal Chundar Manna* v. *Gosain Das Kalay*[1]. Therefore the District Judge clearly erred in holding that this petition did not serve as a step-in-aid of execution.

Now, what is the effect of that step? As we have pointed out, the original petition was dismissed by an order of the District Judge on the 26th February, 1938. This gave a further period of three years, either from the date of the application or from the date of the order dismissing it. The Full Bench which decided *Ayi Goundan* v. *Solai Goundan*[2], left open the question whether time began to run from the date of the application or the date of the order on it, because it was unnecessary to decide it on the facts of that case. It is unnecessary for us to go into the question here because the execution petition of the 14th November, 1942 was filed more than three years after the date of the first petition. The defective petition of the 24th July, 1941, was also filed more than three years from the date of the order on the first petition. This means that the step-in-aid pleaded by the decree-holders does not help them so far as the defendants, other than the second and sixth defendants, are concerned. It does not help them with regard to the second and sixth defendants, if it be true that on the 14th November, 1939, they admitted their liability under the decree in proceedings before the Debt Conciliation Board. The District Court has not inquired into the question whether there was such an admission. Consequently the inquiry must be held.

The result is that the appeal is dismissed with costs as against all the respondents, except the second and fourth respondents (the second and sixth defendants respectively). The case will be remanded to the District Court to inquire into the question whether there was an acknowledgment of the debt made in the Debt Conciliation Board proceedings; and if it is so found, the decree-holder will be entitled to execute the decree against the second and sixth defendants. If there was no acknowledgment, the petition against these defendants must also be dismissed. The costs of the appeal so far as the second and fourth respondents are concerned will be made costs in the further proceedings in the Court below.

V.P.S. —— *Appeal dismissed except as against two respondents.*

IN THE HIGH COURT OF JUDICTAURE AT MADRAS.

PRESENT :—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kolluri Subba Rao and another .. *Appellants**.

v.

Gurram Viraswami and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), section 8—Set off of another debt due from the debtor to the creditor—Is "payment" for purposes of the Act.

A set off of another debt due from the debtor to the creditor can be regarded as a "payment" for the purposes of the Madras Agriculturists' Relief Act.

Trinidad Lake Asphalt Operating Co., Ltd. v. *Commissioners of Income-tax of Trinidad and Tobago*, (1945) A.C. 1 : 8 F.L.J. 97 (P.C.), relied on.

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, in O. S. No. 9 of 1943, dated 10th December, 1943.

The Advocate-General (*K. Rajah Aiyar*) and *V. Viyyanna* for Appellants.

K. Bhimasankaram for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellants are the plaintiffs who filed a suit on a promissory note, Ex. P-1 dated 23rd August, 1937, executed by the first defendant in favour of one Venkataratnam who is the plaintiffs' father for a sum of Rs. 17,169-12-3. The transaction has a long antecedent history. The main question to be decided is the effect of the application of Madras Act IV of 1938 to the debt.

---

1. (1898) I.L.R. 25 Cal. 594 (F.B.).
2. (1945) 1 M.L.J. 47.

* Appeal No. 260 of 1944. 9th August, 1945.

The story begins in August, 1928, when the first defendant was proposing to buy certain lands in Court auction and he approached Venkataratnam for assistance in financing the purchase. They entered into an agreement Ex. P-2 dated 31st August, 1928, whereby it was settled that, as soon as the sale was confirmed in favour of the first defendant, the first defendant would give a half share of the property to Venkataratnam and Venkataratnam would pay to the first defendant half of the final bid of Rs. 15,050, and the agreement also recites the fact that Venkataratnam has on that day advanced a sum of Rs. 3,762 which was the deposit that the purchaser had to make towards the sale amount. The agreement concludes with the recital that if for any reason the sale should be cancelled both parties to the agreement should share the profit or loss equally.

Contemporaneously with this agreement there is a promissory note, Ex. P-6, which recites that the first defendant has borrowed from Venkataratnam a sum of Rs. 3,762 for the purpose of making a deposit in respect of the bid of Rs. 15,050 in the Court auction. On the 12th of September, 1928, the first defendant executed a further promissory note, Ex. P-7, in favour of Venkataratnam. This recites that for the purpose of paying the sale price into Court the borrower has borrowed Rs. 9,738 from Venkataratnam. It is common ground that the balance of the purchase price was made up by the first defendant himself except for an amount of Rs. 50 which is referred to in the final settlement.

On the 28th of September, 1928, the first defendant and Venkataratnam entered into an agreement with a third party by name Ramarsu for the sale of the properties purchased in Court auction to Ramarsu for a sum of Rs. 18,000 the sale being subject to the mortgage amounting to Rs. 28,000, which burdened the property. This agreement recites the fact that the first defendant has borrowed Rs. 13,500 from Venkataratnam for the purchase and has executed promissory notes. The prospective purchaser Ramarsu executes a promissory note for Rs. 3,000 in favour of Venkataratnam as an earnest of the purchase price and promises to pay the balance with interest. Ramarsu did not carry out the terms of this agreement. Consequently there was a further agreement between the first defendant and Venkataratnam, Ex. P-3, dated 23rd August, 1931, whereunder they renew the previous arrangement and come to an understanding as to the way in which the money payable by Ramarsu under Ex. P-10, shall be divided between them. On the same date there was a fresh promissory note, Ex. P-8, dated 23rd August, 1931, which renews and consolidates the two original promissory notes, Exs. P-6 and P-7 on which at that date the amount due was Rs. 18,710-1-6.

At or about this time a suit was filed against Ramarsu O. S. No. 37 of 1931 to enforce the agreement to purchase the land. The suit was pending till 1935. Meanwhile, there was a further promissory note, Ex. P-9, dated the 23rd August, 1934, which renews the promissory note of 1931, and there was also a fresh agreement, Ex. P-4, which renews the previous agreement and recites the filing of the suit against Ramarsu and the necessity for the parties to adjust their affairs on the basis of the decision in that suit. In 1935, the suit against Ramarsu was decreed and about the same time there was a decree in favour of the mortgagee in respect of his mortgage over the land to be sold to Ramarsu.

On the 23rd August, 1937 the first defendant and Venkataratmam entered into a settlement of their mutual transactions. This settlement recites the previous history of the dealings and states that it has been settled that the amount due from the defendant to Venkataratnam in respect of the promissory note, after adjusting the amount due from Venkataratnam to the defendant in respect of his half share of the sale amount, comes to Rs. 16,324-7-0. To this was added Rs. 69-5-3 which is principal and interest of a further advance of Rs. 25 (being half of Rs. 50 referred to above) made by Venkataratnam at the time of the sale and a sum of Rs. 776 which represents Venkataratnam's half share in the profits of the land less the sum of Rs. 175 which the defendant had paid in connection with the common execution proceedings, the total being Rs. 17,169-12-3. For

this amount the first defendant executed the suit promissory note in favour of Venkataratnam.

The lower Court has taken the view that though the original transaction is given the form of an unconditional borrowing by the first defendant from Venkataratnam, in substance there is a borrowing only to the extent to which the first defendant's contribution to the joint purchase was financed by an advance from Venkataratnam. The rest of the advances he has treated as Venkataratnam's own contribution to the joint purchase. Having thus ascertained the original amount of the first defendant's liability, he traces it down through the subsequent transactions and scales down the debt accordingly. It is contended for the appellants that this is wrong, that the whole transaction should be regarded as part of a partnership arrangement under which no liability capable of being enforced would subsist until an account was taken of the mutual rights and liabilities of the partners; and on this view it is contended that the debt arose for the first time in 1937 after the accounts were settled and has to be scaled down under section 9 of Madras Act IV of 1938. In the memorandum of cross objections it is contended for the defendants that although the parties might have split up the sums contributed by Venkataratnam into sums which he contributed to the capital of the joint undertaking and sums which he lent to the first defendant, so that the latter might contribute his share to the joint undertking, this was not the form which the transactions took; and it is contended that throughout all the documents it is made abundantly clear that the parties deliberately chose to treat Venkataratnam as the creditor of the first defendant for the full amount of the two original promissory notes and leave Venkataratnam as the debtor of the joint undertaking to the extent of the contribution which he had agreed to make thereto.

It seems to us that the correct way of regarding those transactions is that for which the respondents contend. Throughout these documents there is a continued insistence on the fact that the first defendant has borrowed the full amount from the plaintiffs' father, and it is also made clear that the liability of the plaintiffs' father was not to arise until after the completion of the contemplated conveyance of the half share of the property to him. In fact, it appears that the plaintiffs' father was safeguarding himself against any possible default by the first defendant and that he chose to advance the money on the liability of the first defendant without making any provision that the debt should not be recoverable except to the extent of the excess over the creditor's own contribution towards the joint purchase. Looked at in this way it seems to us clear that the advances made to the first defendant were deliberately kept outside the purview of the joint undertaking. No doubt the parties contemplated that the first defendant's liability would eventually be adjusted out of the proceeds of the joint venture. But it is necessary to distinguish between a financial arrangement which is to be discharged out of the proceeds of a joint venture and one which is itself part of the joint undertaking. We are quite clear that it was the intention of the parties that the first defendant should be under an unconditional liability to repay to the plaintiffs' father the amounts in respect of which he executed these promissory notes. The liability therefore arose as soon as the promissory notes were executed and there was nothing to prevent the plaintiffs' father from maintaining suits on the promissory notes without reference to the details of the joint undertaking.

It is further contended for the appellants that even assuming that the debts evidenced by the two original promissory notes were unconditional debts due from the first defendant to the plaintiffs' father the adjustments made in 1937 whereby the liability of the plaintiffs' father to pay his share towards the joint purchase was set off against the liability of the first defendant under the consolidated promissory note could not be treated as a payment for the purpose of section 8 of Madras Act IV of 1938. It is now well settled for the purpose of this Act that when there is an arrangement under which a mortgagee is in possession of the mortgaged property and is liable to account to the mortgagor for the profits of the land in his possession and to adjust the value

of those profits against the stipulated rate of interest, the receipt of profits by the mortgagee must be treated as a payment towards the debt by the mortgagor. The learned Advocate-General has, however, contended that whatever be the position when the value of produce is adjusted against a mortgage a mere set-off of another debt cannot be regarded as a payment for the purpose of this Act. We find it difficult to agree with this contention. The learned Advocate-General has sought to reinforce his contention by reference to sub-section (4) of section 8 of Madras Act IV of 1938 which saves the creditor from any liability to refund any sum which has been paid to him by reason of the reduction of the debt under that section. But it seems to us preposterous to assume that when a creditor has received any cash more than the amount of the debt as subsequently scaled down he should be in any better position in the matter of liability to refund than he would be if he has received payment by means of an excess adjustment of a debt due by himself to his debtor. The nature of such adjustments is made clear in a recent decision of the Privy Council in *Trinidad Lake Asphalt Operating Co. Ltd.* v. *Commissioners of Income-tax of Trinidad and Tobago*,[1] where their Lordships were concerned with the interpretation of the word "transmission." In dealing with the nature of the adjustment then in question their Lordships quoted the judgment of Mellish, L.J., in In re *Harmony and Montague Tin and Copper Mining Co., Spargo's case*[2] to the following effect:

"Nothing is clearer than that if parties account with each other, and sums are stated to be due on the one side, and sums to an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by *A* to *B*, and then handing it back again by *B* to *A*, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards."

Their Lordships go on to state:

"This statement gives a description of what is often called a settlement in account or a set off, the word not being there used in the technical sense of the statutes of set off. There is actual, not merely notional or constructive payment of the indebtedness on either side."

Applying this principle in the present case, when Venkataratnam agreed with the first defendant that his debt to the first defendant in respect of the contribution which he had undertaken to make towards the sale should be adjusted against the promissory note debt due by the first defendant to Venkataratnam, there was in fact a payment of Venkataratnam's debt, to the first defendant and a corresponding payment of a part of the first defendant's debt to Venkataratnam. We consider that such a set off can properly be treated as a payment for the purpose of section 8 of Madras Act IV of 1938. It is conceded that in this view of the law and the facts, applying section 8 (2) to the transaction, nothing remains due to the plaintiffs.

The result therefore is that Appeal No. 260 of 1944 is dismissed with costs. The memorandum of objections is allowed with costs and the plaintiffs' suit will be dismissed. The defendants are entitled to their costs in the trial Court.

K.S. — *Appeal dismissed and memorandum of objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction)

PRESENT:—MR. JUSTICE CLARK.

P. V. Damodara Reddi and another .. *Appellants**

v.

Indian National Agencies, Limited. .. *Respondents.*

Companies Act (VII of 1913) Sections 30 (2) and 38—Allotment of shares by the directors and entry in the register of members—Cancellation of allotment after eight months as invalid for want of consent of the company in general meeting as required by the articles of association—Removal of the names of those members—Competency of the directors—Proper remedy of the company.

Article 5 of the articles of association of a company provided as follows: "The shares shall be under the control of the directors who may allot or otherwise dispose of the same only among the

1. (1945) A.C. 1: 8 F.L.J. 97 (P.C.). 2. (1873) L.R. 8 Ch. 407, 414.

* Application Nos. 2258 and 2259 of 1944. 16th January, 1945.

existing members but shall not without the consent of the company in general meeting allot or otherwise dispose of them to outsiders."

Two persons applied for shares in that Company at a time when the company consisted of only six members and all of them were directors. Each was allotted two shares at a meeting of five of the directors of the company. Their names were duly entered on the register of the members of the company. Some eight months later, the directors resolved to cancel the allotments on the ground of their being invalid for want of consent of the company in general meeting as required by article 5 of the articles of association of the company and removed their names from the register of the members of the company. On application by those members to rectify the register by reinserting their names,

Held, that the allotments must, in the circumstances of the case, be regarded as valid and binding on the company. Though the applicants for shares must be deemed to have contracted on the footing of the articles of association, including article 5, they were not bound to inquire into the regularity of the internal procedure—what is called, the "indoor management." They were entitled to assume that the sanction of the company in general meeting as required by article 5, had, in fact, been obtained. They were persons who had agreed to become members of the company and the addition of their names to the register of members of the company, constituted them members of the company.

In the circumstances, a meeting of the board of directors of the company and the company in general meeting were two descriptions of one and the same body and hence it was too technical to consider whether the six members of the company were or were not to be regarded as having sanctioned what five of their number did as directors.

The register of the members of a company is a public document and there is no provision of the Companies Act which permits the directors or officers of a company to make any alteration to the register in circumstances similar to those of the present case. If members' names have been improperly added to the register the remedy of the company is to apply to the Court under section 38 of the Act for the rectification of the register and not to take upon itself to alter the register.

In the matter of the Indian Companies Act, VII of 1913, and In the matter of the Indian National Agencies, Limited.

Row and Reddi for Appellants.

V. K. Thiruvenkatachari for Respondents.

The Court delivered the following

JUDGMENT.—P. V. Damodara Reddi and D. Duraiswami Nayudu, each applied in writing for shares in the Indian National Agencies, Limited. These shares were of the face value of value of Rs. 1,000. Their applications were considered at a meeting of the directors of the company held on 12th April, 1942. The applications for shares appear to have been made in February, 1942. Each of the applicants was allotted two shares at the meeting of 12th April, 1942 and the minutes of that meeting recorded that, upon these allotments being made, the two applicants joined the meeting, that is, as directors of the company. As well as being present at the remainder of this first meeting, the applicants are said to have been present at a number of other subsequent meetings. The applicants were duly entered on the register of the members of the company.

Some eight months later, in about December, 1942, the directors of the company resolved to cancel the allotment of these shares to the applicants. The present applications are applications to rectify the register by reinserting the names of the applicants. The applications are numbered as Applications Nos. 2258 and 2259 respectively of 1944. I have heard these applications together.

It is said on behalf of the company that the resolution to remove these applicants' names from the register of members was passed in consequence of a report of the auditor of the company on the balance sheet of the company's affairs as at 30th November, 1942. In that report, the auditor expresses the view that the allotment of the shares to the applicants was *ultra vires* and that the allotments might therefore be cancelled by the directors.

Before proceeding further, I may say I am disposed to regard the removal by the company of the applicants' names from the register of members as wholly illegal. The register of the members of a company is a public document and I know of no provision in the Companies Act which permits the directors of a company or any officer of a company to make any alteration to the register in the circumstances alleged in the present case. If these members' names had been improperly added to the register, the remedy of the company was to apply to this Court under section 38 for the rectification of its register and not to take upon itself to alter the register.

As, however, the question of the validity or otherwise of the allotment of these shares is now before me on the present applications, I think it would be more proper and suitable for me to dispose of these applications on the merits rather than to allow the applications on the ground stated above and leave the company to file similar applications again, if they are so advised.

The company claims that these allotments vere invalid by reason of the provisions of article 5 of the articles of association. That article provides as follows :

"The shares shall be under the control of the directors who may allot or otherwise dispose of the same only among the existing members but shall not without the consent of the company in general meeting allot or otherwise dispose of them to outsiders."

It is said that, as the allotments were made by the directors without the consent of company in general meeting, they are accordingly void and wholly inoperative.

Now section 30, sub-section 2 of the Act provides that a person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company. The names of both the applicants were entered in the register of members and accordingly the only question to be decided is whether they agreed to become members of the company. If they did, then the applications must succeed.

An agreement to become a member of a company is usually constituted by an offer in the form of an application for shares and an acceptance of that offer by allotment. Admittedly each of the applicants made a written application and the only question is whether those applications were accepted by the company.

As I have earlier observed, the company, relying on article 5 of the articles of association, contends that acceptance of the applicants' offers by the directors alone was entirely inoperative and accordingly there were no allotments. Further, it is urged on behalf of the company that the applicants must be deemed, whatever may have been the fact, to have contracted on the footing of the articles of association including, of course, article 5. This is, I think, undoubtedly the case. As was observed by Lord Cairns, L.J., in *Peel's case*[1] :

"If the memorandum and articles of association are in existence when he (the member) applies for shares, and if he agrees to take his shares on the footing of the memorandum and articles of association (which would seem to be the case here), then I think that he ought to be held bound to look to the memorandum and articles of association before he applied for shares."

But, in my view, this does not dispose of the matter. There are, I think, two grounds on which these allotments must, in the circumstances of this case, be regarded as valid and binding on the company. In the first place, I consider that the applicants are entitled to rely on the rule laid down in *The Royal British Bank* v. *Turquand.*[2] In that case, the articles of the company gave power to borrow with the sanction of a general meeting and it was held that a lender need not enquire whether such sanction had, in fact, been given. He was entitled to assume that it had and it was held further that the absence of sanction could not affect his position. The rule is stated as follows in *Palmer's* Company Precedents, Fifteenth Edition, at page 70 :

"This rule is that where a company is regulated by an Act of Parliament, general or special, or by a deed of settlement or memorandum and articles registered in some public office, persons dealing with the company are bound to read the Act and registered documents, and to see that the proposed dealing is not inconsistent therewith ; but they are not bound to do more ; they need not inquire into the regularity of the internal proceedings—what Lord Hatherley called 'the indoor management.' They are entitled to assume that all is being done regularly."

Applying these rules to the present case, I hold that the applicants were entitled to assume that the directors were acting regularly and that the sanction of the company in general meeting had, in fact, been obtained. That being so, the allotments cannot now be avoided by the company and the applicants must be regarded as persons who agreed to become members of the company. This, added to the fact that their names had been added to the register of members, constitutes them members of the company, and, as such, they are entitled to have their names

1. (1867) 2 Ch.App. 674, 684.
2. (1856) 6 E. & B. 327.

re-entered on the register of the members from the date on which they have been improperly removed.

The other ground, which is equally strong and in favour of the applicants, rests on the peculiar circumstances existing in this company. At the time when the applicants made applications for shares, there were only six members of this company and all of them were directors. Five of them were present at the meeting at which the allotments were made. Now it is said on behalf of the company, that, despite that circumstance, the allotments were bad because the previous consent of the company in general meeting had not been obtained. But in this case, a meeting of the board of directors of the company and the company in general meeting are two descriptions of one and the same body and in these circumstances I find it altogether too technical to consider whether the six members of the company are or are not to be regarded as having sanctioned what five of their number did as directors. In this connection, reference may be made to the case of *Express Engineering Works, Limited*, In re.[1], which concerned a private company of five members, all of whom were directors. It is unnecessary to refer to the facts of the case but the following passages from the judgments of the learned Judges of the Court of Appeal who dealt with that case are, I think, particularly apt. Lord Sterndale, M.R., at page 470, observed :

"In the present case these five persons were all the corporators of the company and they did all meet, and did all agree that these debentures should be issued. Therefore it seems that the case came within the meaning of what was said by Lord Davey in *Salomon* v. *Salomon & Co.*[2] : 'I think it an inevitable inference from the circumstances of the case that every member of the company assented to the purchase, and the company is bound in a matter *intra vires*, by the unanimous agreement of its members.'"

Later, Lord Sterndale says :

"It was said here that the meeting was a directors' meeting but it might well be considered a general meeting of the company, for although it was referred to in the minutes as a board meeting, yet if the five persons present had said, 'We will now constitute this general meeting,' it would have been within their powers to do so, and it appears to me that that was in fact what they did."

Warrington, L.J., observed as follows :

"It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not, but as shareholders acting together they could have made the agreement in question. It was competent to them to waive all formalities as regards notice of meeting, etc., and to resolve themselves into a meeting of shareholders and unanimously pass the resolution in question. Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

I accordingly allow these petitions and direct the rectification of the register of members of this company by the re-entry of the applicants' names with effect from the date when they were wrongfully removed by the company. The applicants will have their costs of these applications.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MOCKETT.

J. Beckett and others .. *Petitioners**

v.

Mrs. Wendy E. Norris .. *Respondent.*

Penal Code (XLV of 1860), section 499, exception 9—Object and scope of—Club cases—Good faith and honest freedom of expression—Written statement of accused—Value to be attached and consideration to be shown—Investigation of evidence in revision—Justifying circumstances.

It is extremely difficult in a social club for a committee faced with any form of disciplinary action against members or *quasi* members to act with universal approval. It is for that reason that, even if wrong, committees deserve and are given the protection embodied in the ninth exception to section

---

1. (1920) 1 Ch. 466.
2. (1897) A.C. 22.

* Cr. R. C. No. 696 of 1944. (Cr. R. P. No. 657 of 1944). 19th December, 1944.

499, Indian Penal Code, without which it would be impossible for such a body to function. This is most especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless committees are always to have the threat of criminal proceedings hanging over them.

Where a complaint was preferred by the wife of a member of a social club, who was as such privileged to use the club under one of its rules, against the members of the committee of the club for defamation contained in a letter addressed to her husband,

Held, that as in the circumstances the committee of the club had acted in good faith even if they were mistaken and did not act without due care and caution, it followed that they were entitled to be acquitted.

As under the Indian law an accused person cannot give evidence on oath, it is of the utmost importance in cases where the burden of proof is cast on the accused that attention and proper consideration should be given to the statement of the accused.

The High Court may be constrained to investigate in revision the evidence in a criminal case if it appeared that certain important aspects had been overlooked and that proper consideration had not been given to the statements of the accused.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the City Magistrate of Madura, dated 23rd June, 1944, and passed in C. C. No. 144 of 1944.

C. Krishnaswami Aiyar for *Messrs. King and Partridge* for Petitioners.

P. Govinda Menon and *N. T. Raghunathan* for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

C. R. Pattabhiraman, C. V. Nilakantan, and *N. Kotyswara Rao* for Respondent.

The Court made the following

ORDER.—The petitioners are the committee members of the Kodaikanal Club. They have been convicted of defaming Mrs. Norris, who, as the wife of a member, is privileged to use the club under rule IV, clause 2 of the Club Rules. She is not of course a member of the club. The penalty imposed by the learned Magistrate was a fine of Rs. 10 on each accused. This is a most unfortunate case in many respects. The complainant was no doubt (although dealing with her own countrymen) entitled to avail herself of the remedy by prosecution rather than by civil action in damages. The effect has been curious in a community used to, what I will describe as, the right rather than the privilege of giving evidence on oath. Although it has been of the utmost importance in this case that they should (the burden of proof being cast upon them) be able to give evidence on oath, the accused have been prohibited from doing so owing to the proceedings being in a criminal forum. I will return to this aspect of the case later.

The facts are as follows :—The Kodaikanal Club has opened its door to members of the Services—Officers are honorary members—and on two nights a week, the dance room is thrown open to British Other Ranks of His Majesty's forces. The Other Ranks are confined to the dance room and are prohibited from using certain other rooms of the club of which the reading room is one. They are also (no doubt for good and sufficient reasons) not allowed to consume intoxicating liquors in the Club. Mrs. Norris receives a number of British Other Ranks at her house "Speke" as paying guests at a small charge, and there is no doubt that she is much interested in their entertainment and welfare. On the 28th October, 1943, by Ex. G, the Honorary Secretary on behalf of the committee, wrote to the complainant's husband, Dr. Norris in Ceylon pointing out that Mrs. Norris at about 9-45 p.m. on the 26th October, was in the reading room before the fire with Other Ranks. It was pointed out that the presence of Other Ranks as guests was restricted to the recreation room on Tuesdays and Fridays from 7-30 to 10-30 p.m. The letter concludes: "The Committee will be glad if you and Mrs. Norris will observe this rule in future". By Ex. G-1, Dr. Norris acknowledged Ex. G and apologised saying that he was in no doubt that the breach of the rule by his wife was due to inadvertence. On 10th February, 1944, the alleged defamatory letter by the Honorary Secretary (Ex. A), was sent to Dr. Norris, who was still in Ceylon. It reads as follows :

"Dear Sirs,

On 29th October 1943 as instructed by the committee, I wrote to you on the subject of your wife having introduced non-members (B. O. Rs.) into the club. On that occasion the President personally spoke to your wife and explained to her the breach of the rules, which she had committed.

You replied in your letter, dated 3rd November 1943, expressing regret in the belief that your wife had acted inadvertently in ignorance of the rules.

I am now directed by the committee to bring to your notice that on the night of Tuesday, February, 1st, 1944, a member of the Committee found your wife and several R. A. F. (B. O. Rs.) drinking in the reading room of the club—a place, which they are not allowed to enter. The committee also learns that on the after-noon of 8th February, 1944, your wife was also seen in the reading room along with a B. O. R. On the same night after the dance a servant of the club reported that your wife was with several B. O. Rs. in the reading room and she asked for them to be served with intoxicating drinks.

I am directed by the Committee to inform you that, in their opinion, the conduct of your wife is injurious to the harmony and interests of the club with reference to R. XII (2).

I am also directed to inform you that in the event of any further such breach of the rules by your wife, after you had an opportunity of communicating with her, the Committee acting under R. XII (4) will proceed to withdraw from her the privilege of using the club.

I am forwarding to you separately a copy of the rules of club and I am sending to your wife a copy of this letter.

Yours faithfully,
(Signed)............
Honorary Secretary."

It will be seen that there are three incidents referred to —one on the 1st February, the second on the afternoon of the 8th February, and the third on the evening of the 8th February. I am not concerned with the second incident as the Magistrate has quite rightly paid no attention to it, since the Committee apologised. Apart from that, on the face of it, it is clearly not defamatory. The charge against the accused differs in one respect from the actual alleged incident. It will be seen in the letter, Ex. A, incident No. 3 reads thus :

"On the same night after the dance, a servant of the club reported that your wife was with several B. O. Rs. in the reading room and she asked for them to be served with intoxicating drinks."

In the charge, this incident is reproduced as follows :

"That on the same night she was with B. O. Rs. in the reading room and asked for drinks to be served to them."

The distinction may have been inadvertently made, but it is not immaterial. The Magistrate was, therefore, concerned with two incidents, and the case before him was put in this manner. Issues 1 and 2 were : (1) Were the allegations defamatory *per se* ? (2) If so, were they true ? and (3) If not, were the accused protected by any one or more of the exceptions to section 499, Indian Penal Code ? Presumably, the 8th and 9th exceptions were invoked. The 9th exception seems to be appropriate.

It is therefore necessary to look at the evidence. I might at this stage say that although this is a criminal revision case, I am constrained to investigate the evidence, because, it appears to me that certain important aspects have been overlooked and that no proper consideration has been given to the statements of the accused themselves. This is regrettable. They are, no one doubts, honourable men who by reason of their exercising a semi-public function have found themselves hailed before a criminal court. They deserved at least as much consideration as the complainant.

[His Lordship after discussing the evidence proceeded] :

My impression of the two incidents is this. With regard to the first, that Mrs. Norris was not having a drink of any sort in the reading room on the night of February 1st, but that Mr. Lake honestly thought that she was, and from the surrounding circumstances was quite entitled to think so. With regard to the second incident on the evening of February 8th—that the servants did see the Other Ranks either in the lounge or reading room or both : Other Ranks admittedly went into the reading room and were in the lounge for a brief time as stated by Mrs. Norris. I think the servants formed an honest opinion that the drinks were ordered

for them; and here again, they were justified in forming that opinion, even if it was a wrong one. With regard to this incident, it does not appear that any complaint was made to the Secretary regarding the non-serving of drinks; and it is quite certain that they were not served because of the above belief of the barman.

The question then arises, were the Committee acting honestly and with due care and attention in writing to Dr. Norris on the basis that the Secretary and servants had made true report. These matters are always questions of fact in every case. I have already indicated that they were abundantly justified in doing so with regard to the incident of the night of February 1st. As to the incident of February 8th, it seems to me that following on the incident of October 1943 and the incident—a most unfortunate incident—of February 1st, 1944, there was nothing so striking about the report from a trusted servant on February 8th as to introduce the element of negligence into the conduct of the Committee when they accepted their employee's account. Is a committee precluded from believing an old and trusted servant? Had this been a civil suit, the accused would have been in a much more favourable position. They could have given evidence on oath. The plea of privilege would have been almost irresistible as there could hardly have been any element of malice. The Magistrate has negatived malice alleged only against accused 1, Mr. Beckett, rightly describing the suggestion as baseless. The definition of good faith would have been that found in the General Clauses Act:

"A thing shall be deemed to be done in good faith where it is done honestly whether it is done negligently or not."

I have accepted that the statements contained in Ex. A are defamatory but not in the least in the manner Dr. Norris supposes. I do not attach the sinister meaning to the word "drinking" which, the evidence shows, so offended Dr. Norris. Had the expression been "having drink with" or "having drinks with," I doubt if anything would have been thought of it. I cannot believe that anybody reading that letter would ever have understood anything more than that the complaint was that Mrs. Norris had broken the club rules, in the first incident, by being with persons in a prohibited part of the club and, in the third incident, by endeavouring in breach of the rules to provide persons with alcohol, who were not permitted to consume it in the club. These are definite breaches of the club rules and such allegations may well be defamatory, but not very defamatory, of the persons about whom they are made. Still I do not think that the members of the Kodaikanal Club would have been very greatly shocked and distressed at hearing of this conduct on the part of one of their members as the prosecution urges. After all, what Mrs. Norris was doing, if true, was breaking the club rules in her over-hospitality to Service guests.

The question, then, is entirely one of good faith. A good deal of confusion seems to have been introduced in this case by a discussion in the lower Court, which was sought to be prolonged before me, based on the notion that Mrs. Norris is a member of the Kodaikanal Club. She is not a member. She is a person privileged to use the club by reason of her husband being a member. Rule XII refers to the infringement of rules and the penalties therefor. At the stage when Ex. A was written, it was clearly not the intention of the Committee then to take disciplinary action provided by Rule XII against Mrs. Norris, *i.e.*, to withdraw her privilege of using the club. That they contemplated so doing, if there was any further breach of the rules is evident from the penultimate paragraph in Ex. A. What then was the position of the Committee at the time of the writing of Ex. A? There had been according to their information, breaches of the club discipline by a person who had no more than the privilege of using the club. Whether informally they might have approached her before posting Ex. A is not a matter for me to decide. It so much depends on the personalities concerned. The Committee might have been wiser in first approaching Mrs. Norris informally; on the other hand, they might not. The member concerned was Dr. Norris and the Committee were undoubtedly entitled to address him. They had already had trouble from one lady who, having the privilege of using the club, had been reprimand or cautioned

for breaking the rules. The Committee did approach her direct and were threatened with legal proceedings for their pains. After that, the Committee were perhaps a little shy of approaching the lady privileged members, and so they wrote to the complainant's husband sending a copy of the letter to Mrs. Norris for her information, which I do not think can be criticised. It is, however, clear from the last sentence of clause 4 of rule XII that, had it been decided to withdraw the complainant's privilege, she should, under the general law for which there is abundant authority in what are known as the Club Cases, have received due notice of the inquiry and been given an opportunity to reply to the charge against her. The Committee did not decide to do that. They quite definitely decided only to issue a warning with a statement of the facts as they understood them to the member responsible, Dr. Norris. They expressly omitted the words injurious to the " character and reputation " of the complainant and confined their complaint to " harmony and interests". Vide rule XII, clause 2. With regard to the action of the Committee, it is remarkable that virtually no attention was paid, at any rate as far as can be derived from the judgment, to the written statements of the accused. It must be remembered it was their only method in these criminal proceedings of replying, especially in a Court where club servants were regarded as automatically unbelievable against the word of the member. I cannot but be impressed by the earnestness of the accused's written statements, especially that of Mr. Westerdale. That they acted honestly and in good faith in the sense that those expressions are ordinarily understood is beyond doubt. There have been a number of criticisms of their conduct after the letter was sent. Mrs. Norris complains bitterly that they would not then hear her. Here again for the reasons I have indicated above, I express no opinion about this. All I am concerned with is that the libel had been published by then, and any subsequent conduct of the Committee is relevant only to the penalty. The Committee is criticised because they apologized and withdrew with regard to the second incident but withdrew only the allegations relating to incidents 1 and 3. I express no opinion about this either, especially as I hope this unhappy affair will soon be forgotten. I think it, however, right to say this, that nothing that has emerged in this case seems to me in the least to affect the character of Mrs. Norris nor that of any member of the Committee. To me, the most striking feature of the whole affair is an apparent lack of proportion shown by everybody in respect of the whole story. The only importance the case has is that it shows how extremely difficult it is in a social club for a Committee faced with any form of disciplinary action against members or quasi-members to act with universal approval. It is for that reason that, even if wrong, Committees deserve and are given that protection (embodied in Exception 9) without which it would be impossible for such a body to function. This is most especially so when a complaint has to be issued not to a member himself about his own conduct but to a member relating to the conduct of another person. Honest freedom of expression must be preserved unless Committees are always to have the threat of criminal proceedings hanging over them.

Having indicated that the Committee of this club, acted in good faith even if they were mistaken, and did not act without due care and attention, it follows that this petition must be allowed. The accused are acquitted, and the fines, if paid, will be refunded.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Sivalinga Pathar .. *Petitioner**

v.

Narayani Ammal .. *Respondent.*

Civil Procedure Code (V of 1908), Order 12, rule 6—Partition suit—Decree being partly preliminary and partly final—Application for amendment of written statement at later stage—Maintainability.

* C. R. P. No. 444 of 1945. 30th August, 1945.

A Hindu died issueless leaving him surviving his widow. She filed a suit against her husband's surviving brother and the widow of a deceased brother claiming a share in the properties other than agricultural lands by virtue of the provisions of the Hindu Women's Rights to Property Act. In his written statement the first defendant while contesting the suit on other matters stated that he had no objection to the partition of the divisible items and to the separate possession thereof. His advocate thereafter appeared and stated that he had no objection to an interim decree for partition as prayed for, provided it was made on the understanding that it did not debar any reallotment of the properties at the final decree stage if such allotment was considered necessary or desirable in order to make provisions for discharge of family debts or payment of maintenance if the said monies were payable from the family properties. The Court thereupon passed an *interim* decree as prayed for on the application under Order 12, rule 6, Civil Procedure Code. A commissioner was appointed in due course for the division of the items and ultimately an order was passed as follows: "It is agreed that subject to re-allotment when the final decree is being passed the properties may be divided as follows: . . . . ." A decree was drawn up on the same date in accordance with the order. In view of the judgment of the Federal Court concerning the *intra vires* character of the Hindu Women's Rights to Property Act of 1937, the first defendant applied to amend his written statement at a later stage with reference to the very items covered by the decree.

Held, that the decree passed was partly preliminary and partly final in so far as it affected the particular items divided, and it was not open to the first defendant to apply for an amendment of the decree at the stage when he applied for that purpose.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Kumbakonam, dated 7th March, 1945, in I. A. No. 61 of 1945 in O. S. No. 8 of 1944.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—There were three brothers, Sivalinga, Ekambara and Chockalinga. The last died about 12 years ago. Ekambara died on the 16th July, 1940, issueless leaving him surviving his widow. Sivalinga was the survivor. After the death of her husband, Ekambara's widow filed O. S. No. 8 of 1944 in the Court of the Subordinate Judge of Kumbakonam against Sivalinga as the first defendant and Chockalinga's widow as the second defendant. She claimed *inter alia* a share in the properties other than agricultural lands by virtue of the provisions of the Hindu Women's Rights to Property Act, 1937. In his written statement, the first defendant while contesting the suit on other matters stated with reference to her claim to the division of houses and moveable properties that he had no objection to the partition of the divisible items comprised under those schedules and to the separate possession and enjoyment of a moiety of the said items by the plaintiff until her death. On the basis of this admission the plaintiff applied under Order XII, rule 6 for a decree being passed in respect of A schedule properties and notice of the application was given. The first defendant's advocate appeared and stated that the first defendant had no objection to an interim decree for partition as prayed for, provided it was made on the understanding that it did not debar any re-allotment of the properties at the final decree stage if such a re-allotment was considered necessary or desirable in order to make provisions for discharge of family debts or payment of maintenance dues if such debts or maintenance claim are found to be really payable from the family properties. The Court passed, on the basis of the admissions contained in the written statement as well as on the representation made by the first defendant's advocate, an interim decree as prayed for on the application under Order XII, rule 6. A commissioner was appointed in due course for the division of the items and ultimately an order was passed on the 14th October, 1944, in the following terms—

"It is agreed that subject to re-allotment when the final decree is being passed, the properties (houses and shops) may be divided as follows: Plaintiff to take items 2 and 5 to 9 and first defendant to take items 1, 4 and 10 and to give to second defendant the portion suggested by commissioner in item 1 for her residence. Item 3 is not at present available for division as it is in the possession of an alienee."

A decree was also drawn up on the same date in accordance with this order.

In the meantime the question as to the *intra vires* of the Hindu Women's Rights to Property Act of 1937 was being considered by the Courts. On a reference made

by the Governor-General to the Federal Court, that Court held in *In the matter of The Hindu Women's Rights to Property Act*[1], that the Act was *intra vires*. The matter came up before this Court in *Umayal Achi* v. *Lakshmi Achi*[2]. Following the ruling of the Federal Court it was held that the Act was *intra vires* the powers of the Central Legislature except with regard to the provisions affecting agricultural lands. This decision went up in appeal to the Federal Court and that Court by a majority in *Umayal Achi* v. *Lakshmi Achi*[3] upheld the decree of this Court. One of the three Judges of the Federal Court however took a contrary view. Apparently in view of the circumstance, the first defendant felt it necessary to amend his written statement so as to have the benefit of the opposite contention in case, on a further appeal to the Judicial Committee, the view should prevail that the said Act was not within the law making authority of the Central Legislature. The lower Court refused to permit the first defendant to amend his written statement and the first defendant seeks by this petition to revise the said order.

The question is whether on account of these considerations and in the circumstances of the case, it was open to the first defendant to amend his written statement so as to embody contentions which were directly opposite to what he had urged in his original written statement. Learned Counsel for the petitioner has raised two contentions in this connection. The first is that the decree passed in this case which is called the interim decree is neither in form nor in substance a decree within the meaning of section 2 (2) of the Civil Procedure Code and that it is not conclusive even so far as the Subordinate Judge is concerned as under the terms of the decree itself, it was open to the parties and to the Court to make further re-allotments. The second contention is that even if it is an interim decree, it is not in the nature of a preliminary decree as contemplated in section 97 of the Civil Procedure Code and that consequently there is no bar to the petitioner raising the question of the validity of the so-called interim decree in an appeal against the decree that might ultimately be passed by the Court. He draws attention to clause (2) of Order XX, rule 18, to show that a decree of this kind could not properly be treated as a preliminary decree such as would fall within the ambit of section 97. He argues that having regard to the language of section 105, it would be open to him not to prefer an appeal against the interim decree but to wait until the final decree was passed and to object to this decree in a ground of objection raised in the memorandum of appeal to be filed therein.

I am unable to accept any of these contentions. Clause (*iii*) of Order XII, rule 6 says that whenever an order or judgment is pronounced under the provisions of this rule, a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced. A decree was accordingly passed in the present case. The rule does seem to contemplate an order having the status of a decree being passed on an application made under Order XII, rule 6. The contention that the reservation made in the said decree about its being subject to further re-allotments at the stage of the final decree to my mind does not take away from it the effect or character of a decree. A decree may be either preliminary or final and may be partly preliminary and partly final. In the present case, the decree does not refer to either schedule B or schedule C. It covers all items in Schedule A except the third item which being in the hands of an alienee, was not dealt with. Out of the remaining nine items, six were allotted to the plaintiff and three to the first defendant. One of the three items given to the first defendant consisted of the family house being item 1 and the decree provided that the second defendant Chockalinga's widow was entitled to reside in the portion thereof which was marked out by the commissioner. Any re-allotment that could possibly be made thereafter at the final decree stage could only be with reference to those nine items. There could be no

1. (1941) 2 M.L.J. 12 : I.L.R. 1941 Kar. 556 : 1944 F.L.J. 33 (F.C.) 148 : 4 F.L.J. 1.
2. (1944) 1 M.L.J. 70 : I.L.R. (1944) Mad.
3. (1945) 1 M.L.J. 108 : 1945 F.L.J. 8 (F.C.).

further variation of this decree either by consent of parties or by order of Court, so far as the conceding to the plaintiff of a half share in the divisible properties went. Therefore the argument that the decree in question does not amount to a decree because of the existence of this reservation therein has no force. It will perhaps be right to call this a decree partly preliminary and partly final because so far as it affects the particular items in question, it is in the nature of a final decree, subject only to its being varied if necessary by way of re-allotment of the items by consent of the parties. Reference was made for the petitioner to *Appa Trimbak Despande* v. *Waman Govind Despande*[1], but in that case there had actually been an alteration in the case law which had, as their Lordships of the Privy Council pointed out, produced an embarrassing situation for the appellants. In the present case, however, no such change in the case law has yet occurred and the petitioner is only seeking by way of abundant caution to provide for a relief which he might be able to urge in case there should be an appeal to the Privy Council and in the event of the Privy Council taking a view conformable to his contentions. That to my mind is no ground for allowing an amendment when the admissions made by him have gone beyond the stage of a decree duly passed.

The learned advocate for the respondent has drawn my attention to clause (*iii*) of section 96 of the Civil Procedure Code under which no appeal can be brought against a consent decree. That also seems to me to be a strong ground against the petitioner. The order of the learned Subordinate Judge was right and does not call for any interference.

The civil revision petition is dismissed with costs.

B.V.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA AND MR. JUSTICE YAHYA ALI.

Velu Sethurayar and another .. *Appellants**

v.

Karuppayammal and others .. *Respondents.*

Hindu Law—Reversioner—Suit to avoid alienation by widow—Plaintiffs not being nearest reversioners—Grant of relief—Permissibility.

It is well settled that even though a declaration may be for the benefit of the person who ultimately turns out to be the reversioner, it is the declared policy of the Courts not to entertain a suit by a remote reversioner when there is a nearer reversioner alive. This rule is subject to exceptions such as refusal of the nearest reversioner without sufficient cause to institute proceedings or his collusion with the widow or alienees. Where the defendants pleaded in the written statement that the plaintiffs were not the nearer reversioners and that another defendant was the nearest reversioner, but the plaintiffs persisted in their attitude that they were the nearest reversioners, and the trial Court having decided against them on the ground that they were not the nearest reversioners they preferred an appeal to the High Court and therein urged that the other defendant who was the nearest reversioner was colluding with the alienee-defendants and that the declaration should be granted for the benefit of the reversion.

Held, that the suit could not be sustained by the plaintiffs and that it was not a proper case where a declaration should be granted even though they were not the nearest reversioners.

Lakshmi v. *Anantharama*, (1937) 2 M.L.J. 209 : I.L.R. (1937) Mad. 948 (F.B.), considered.

Appeal in *forma pauperis* against the decree of the Court of the Subordinate Judge, Dindigul in O. S. No. 7 of 1943 (Pauper).

K. S. Ramamoorthy for Appellants.

C. A. Seshagiri Sastri for Respondents.

The Judgment of the Court was delivered by

Somayya, J.—This is an appeal filed by the plaintiffs who are the sisters' sons of the last owner for a declaration that the alienations made by one or other of the three widows of the last male holder are not valid and binding on them, after the death of the widows. The suit is resisted by the alienees mainly on the ground that the plaintiffs are not the nearest reversioners but that the 22nd defendant is the nearer

---

1. I.L.R. (1942) Bom. 75.

* Appeal No. 400 of 1944 (Pauper). 24th July. 1945.

reversioner, he being alleged to be the deceased's brother's son. If the 22nd defendant is the son of a deceased brother of the last male holder, it is undoubted that in law he succeeds in preference to the sisters' sons. The 22nd defendant also claims that he was the nearer reversioner and that the alienations were not binding upon him. On these pleadings an issue was joined whether the plaintiffs are the nearest reversioners which involves the question of fact whether the 22nd defendant is the brother's son of the deceased. After an elaborate trial, the lower Court found against the plaintiffs and in favour of the relationship set up on behalf of the alienees and by the 22nd defendant. The suit was accordingly dismissed as being one by a remote reversioner. The lower Court held that there were no circumstances alleged or proved which would enable a remote reversioner to maintain a suit when there is a nearer reversioner alive. The plaintiffs appeal.

The finding that the plaintiffs are not the nearest reversioners and that the 22nd defendant is the brother's son of the deceased is amply justified by the documentary and oral evidence which has been dealt with in the judgment of the lower Court. We see no reason to differ from the finding of the lower Court on that point.

The main question urged by the learned advocate for the appellant is that the 22nd defendant who is a party to this suit has not filed any suit to impugn the alienations in question so far, that he himself is an alienee of one of the items in the suit, and that this is a case in which the 22nd defendant has either colluded with the other alienees or has precluded himself from filing the suit. It is therefore urged that a suit by the remote reversioner may be sustained. The declaration sought, it is said, is for the benefit of the reversion, *i.e.*, for the benefit of the person who happens to be the reversioner at the time of the widow's death.

It has long been established that even though a declaration may be for the benefit of the person who ultimately turns out to be the reversioner, it is the declared policy of the Courts not to entertain a suit by a remote reversioner when there is a nearer reversioner alive. This rule is subject to certain exceptions which are well summed up in the leading case of *Rani Anand Kunwar* v. *The Court of Wards*,[1] namely, refusal of the nearest reversioner without sufficient cause to institute proceedings or his collusion with the widow or alienees. Barring such and other like exceptions, it is clear that we cannot allow a suit by a remote reversioner to be maintained. It is true, as alleged by the learned advocate for the appellants, that in some cases of an exceptional character, a suit by a remote reversioner has been entertained. He relies upon the decision of this Court in *Lakshmi* v. *Anantharama*[2] where the lower Court granted a declaration in favour of the plaintiffs holding that they were the nearest reversioners of the last male holder. The question whether the plaintiffs were the nearest reversioners or not depended on whether Madras Act II of 1929 had reference to the death of the last male holder or the death of the widow or other limited owner, on whose death the succession opens. If the material point of time was the male holder's death, then the plaintiffs in that action were undoubtedly the nearest reversioners. If the material point of time was the date of the death of the limited owner when the succession opened, there were a sister and sister's son who would be the nearer reversioners under the new Act. There was a conflict of judicial opinion on the point. The trial Court upheld the plaintiffs' contention, found the alienations not valid and granted a declaration. In appeal, owing to the difference of opinion above mentioned the matter was referred to a Full Bench. The Full Bench held that the material point of time was when the succession opened. This led to the result that the plaintiffs were not the nearest reversioners. It was under those circumstances that an appeal was made to a Division Bench when the case came on before them, to allow the plaintiffs to add the sister's son who was then a minor as a party and to have the question determined. Owing to the very exceptional nature of the case and to the circumstance that it was only when the

1. (1880) L.R. 8 I.A. 14 : I.L.R. 6 Cal. 764 (P.C.).
2. (1937) 2 M.L.J. 209 : I.L.R. (1937) Mad. 948 (F.B.).

Full Bench took a different view that the plaintiffs were decided to be remoter reversioners, the suit was entertained at the instance of the remote reversioner making the nearer one a party. We must also note the fact that the trial Court had granted a decree in favour of the plaintiffs in that case and the question was whether that decree ought to be set aside.

In the present case the defendants pleaded in the written statement that the plaintiffs were not the nearer reversioners and that the 22nd defendant was the nearest reversioner. That was the stage for the plaintiffs if they had so minded, to allege that even if they were not the nearer reversioners, there was collusion or inaction or other circumstances which enabled them to file the suit even though the 22nd defendant was the nearer reversioner. Far from taking such a course they persisted in their attitude that they were the nearest reversioners and alleged that the 22nd defendant was not the brother's son of the deceased. The parties went to trial on that question and after an elaborate trial, the plaintiffs' case has been found against. They raise this question for the first time in appeal. There is no indication that even at the time of the trial in the Court below the question was ever raised by the appellants. We are therefore unable to entertain this question at this stage.

The appeal fails and is dismissed with costs. This appeal has been filed in *forma pauperis*. The appellants must pay the Court fee payable on memorandum of appeal.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

Ambujammal .. *Appellant*.*

v.

S[illegible]arammal and others .. *Respondents.*

Limitation Act (IX of 1908), Articles 181 and 182—Compromise maintenance decree in 1922—Suit for reduction of claim—Modification of original decree in 1937—Appeal—Restoration of original claim in 1940—Execution application filed in the interval dismissed in 1937 as not pressed—Fresh execution application in 1941 in respect of period between 1935 and 1941—Bar of limitation—Plea of exclusion of time and revival of prior application—Maintainability.

A compromise maintenance decree was passed in 1922. In 1937, in a suit filed by the opposite party for the reduction of the claim, the maintenance was put on grain basis by the trial Court. But the appellate Court dismissed the suit in 1940 and restored the original compromise decree. Meanwhile, in 1937, after the decision of the trial Court in the suit for the reduction of maintenance, an earlier execution petition filed by the decree-holder was dismissed as not pressed. In 1941, the present execution petition was filed by the decree-holder claiming maintenance for the period between 1935 and 1941. On the question whether the claim was in time as regards the period between 1935 and 1938,

Held, (1) that since there was no legal impediment in the way of the execution of the earlier compromise decree by the appellant the principle enunciated by the Privy Council in *Nagendaranath De v. Sureshchandra De*, (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 at p. 7, (P.C.) cannot apply and no time can be excluded to save limitation bar.

(2) That where Article 181 a specific article is applicable, Article 182 of the Limitation Act cannot be invoked.

(3) That when the execution petition of 1937 was dismissed as not pressed, it was a final order and the petition filed in 1941 cannot be treated as a revival or continuance of the petition which was concluded by that order.

Appeal against the order of the Court of the Subordinate Judge, Chingleput, in A.S. No. 150 of 1943, dated 16th March, 1944 preferred against the order of the Court of the District Munsif, Poonamallee, in E.P. No. 386 of 1941, in O.S. No. 29 of 1921.

K. S. Desikan and *S. Rajagopalan* for Appellant.

R. Gopalaswami Aiyangar and *A. Pattabhiraman* for Respondents.

The Court delivered the following

JUDGMENT.—Seshadri Aiyangar had two sons, Rangachari and Raghavachari both of whom died issueless. Rangachari's widow is Ambujammal who is the appellant. Raghavachari's widow was Tiruvengadammal who adopted her daughter's

* A. A. A. O. No. 322 of 1944. 17th September, 1945.

son Padmanabhachari, whose father was her son-in-law, Chakravarthi Aiyangar. Ambujammal filed O.S. No. 29 of 1921 against Tiruvengadammal and Chakravarthi, the latter for being in possession of the property belonging to the family. She claimed a half-share in the properties and she questioned the adoption. The suit was ultimately compromised. On the 22nd August, 1922, a compromise decree was passed which provided for the payment of Rs. 225 per annum to her towards maintenance, the payment to be in two instalments one in March and the other in June. The decree was being executed until O.S. No. 154 of 1935 was filed by Chakravarthi Aiyangar praying for the reduction of the maintenance amount awarded under the compromise decree. It was not precisely a reduction but it was a prayer to convert the maintenance into grain basis from cash basis which in effect led to a reduction. Chakravarthi Aiyangar succeeded to some extent as the first Court decreed that maintenance should be put on grain basis. The decree of the first Court in O.S. No. 154 of 1935 was passed on 9th July, 1937. Ambujammal appealed against that decree and the Subordinate Judge of Chingleput allowed the appeal (A.S. No. 56 of 1940) on 12th August, 1940, and dismissed Chakravarthi Aiyangar's suit, thereby restoring with full effect the compromise decree in O.S. No. 29 of 1921 dated 22nd August, 1922. On 24th June, 1937, Ambujammal filed E.P. No. 280 of 1937 for execution of her maintenance decree. That execution petition was dismissed on 13th August, 1937, as not pressed consequent upon an endorsement made on the above execution petition that the petition might be closed for the present. After the passing of the appellate decree in A.S. No. 56 of 1940, Ambujammal filed E.P. No. 386 of 1941 out of which the present appeal arises. She claimed maintenance due to her from 10th January, 1935, to 10th January, 1941. The respondent opposed the application and contended that the claim was barred by limitation for the period from 10th January, 1935, to 31st March, 1938. The learned District Munsiff excluded the maintenance for that period and ordered execution for the balance. An appeal against the said order before the Subordinate Judge of Chingleput was dismissed and the present appeal is against the said order.

The learned advocate for the appellant has put forward three propositions. First, that the period from 9th July, 1937, when the District Munsiff passed the decree in O.S. No. 154 of 1935 to 12th August, 1940, when the Subordinate Judge virtually restored in full the decree in O.S. No. 29 of 1921 should be excluded, as during that period the decree in O.S. No. 29 of 1921 was incapable of execution in the form in which it was passed. The second contention is that, if Article 181 does not apply Article 182 would apply and the case would come under the second clause of that Article which provides that where there has been an appeal limitation runs from the date of the order of the appellate Court. The third argument is that E.P. No. 386 of 1941 should be treated as a revival or continuance of E.P. No. 280 of 1937 because there was no final disposal of that execution petition; the order of dismissal having been passed on the endorsement that the petition might be closed for the present.

I see no force in any of these three contentions. With regard to the first point, learned counsel relied on the general rule enunciated by the Privy Council in *Nagendranath De* v. *Sureshchandra De*[1]. The rule laid down by their Lordships that

> "So long as there is any question *sub judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

It was contended that this principle has been followed by Krishnan Pandalai, J., in *Mangamma* v. *Narayanappa*[2] and by a Division Bench of this Court in *Ramachandra Rao* v. *Venkateswara Rao*[3]. All those cases may be distinguished on the ground that in those cases there was an impediment in the way of the execution of the decree. In the present case there was no difficulty whatever in the matter of execution of the

1. (1932) 63 M.L.J. 329 : L.R. 59 I.A. 283 : I.L.R. 60 Cal. 1 at 7 (P.C.).
2. (1933) 65 M.L.J. 747.
3. (1938) 2 M.L.J. 1048 : I.L.R. (1939) Mad. 252.

decree in O. S. No. 29 of 1921 until the passing of the decree by the District Munsiff in O. S. No. 154 of 1935. Even thereafter the decree could have been executed for that part of the amount which was granted under that decree. In *Chidambaram Chettiar* v. *Meyyappa Chettiar*[1] this aspect of the matter has been fully emphasised. The learned Judges in that case said :

"In *Satyanarayana* v. *Seethayya*[2], this Court held that so long as there is no legal impediment to the filing of a suit earlier, time cannot be excluded, and in *Sundaramma* v. *Abdul Khadar*[3], it was held that no equitable grounds for the suspension of a cause of action can be added to the provisions of the Indian Limitation Act. In dealing with a case under section 15 of the Limitation Act, the Allahabad High Court in *Lakshmichand* v. *Bibi Kulsumunnissa*[4] pointed out that there is no reference in the section to the case of the execution of one decree being suspended or rendered impossible by a subsequent decree inconsistent with it in another suit."

In *Satyanarayana* v. *Seethayya*[2], a Division Bench of this Court emphasised the same principle that so long as there was no legal impediment to the filing of the suit earlier, no time can be excluded. The first contention therefore fails.

With regard to the second argument, when there is a specific article, *viz.*, Article 181 applicable to the case, Article 182 cannot be invoked.

The last argument is equally without substance. The order passed by the Court is that the execution petition was dismissed as it was not pressed. This was undoubtedly a final order and it cannot be said that the subsequent petition filed in 1941 can be treated as a revival or continuance of the petition which was concluded by that order.

The appeal fails and is dismissed with costs of the fourth respondent.

Leave to appeal is refused.

K.C. — *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of the Island of Malta.)

PRESENT:—LORD CHANCELLOR (VISCOUNT SIMON), LORD WRIGHT, LORD PORTER, LORD SIMONDS AND LORD GODDARD.

Eric Reginald Charles Alexander Strologo .. *Appellant**

v.

The King .. *Respondent.*

Privy Council—Practice—Interference in criminal appeals—Breach of natural justice—What may amount to.

If a conviction has resulted from regarding as criminal an act which is authorised by law that does amount to a breach of natural justice, because it means that there has been a conviction for what the law does not recognize as an offence and would fall within the principles upon which the Privy Council acts in advising His Majesty to review proceedings in courts of criminal jurisdiction.

Frank Gahan for Appellant.

Attorney-General and *Kenelm Preedy* for Respondent.

Their Lordships' Judgment was delivered by

LORD GODDARD.—On 31st July, 1943, the appellant was indicted before His Majesty's Criminal Court for the Island of Malta and its Dependencies with having without a lawful order from the competent authorities arrested, detained or confined a person against the will of the same and of having provided a place for carrying out such arrest, detention or confinement, with the aggravating circumstances that the individual arrested, detained or confined received bodily harm and with the further aggravating circumstances that the detention or confinement was continued by him with the knowledge that an order had been issued by the competent authority for the release or production of the person detained, contrary to Articles 85 and 86 (3) and (4) of the Criminal Laws. The Court convicted the appellant of the substantive offence and also found both of the alleged aggravating circumstances proved. They sentenced him to 13 months' imprisonment with hard labour which

1. (1943) 2 M.L.J. 510.
2. (1926) 52 M.L.J. 396 : I.L.R. 50 Mad. 417.
3. (1932) 64 M.L.J. 664 : I.L.R. 56 Mad. 490 (F.B.).
4. I.L.R. (1939) All. 207.

* P. C. Appeal No. 13 of 1944. 19th July, 1944.

was the minimum sentence prescribed by law, but the Governor in the exercise of his prerogative reduced the sentence to 3 months. That sentence, less a remission for good conduct, has been served. The appellant by special leave granted on 25th February, 1944, appealed against the conviction. At the conclusion of the argument their Lordships indicated that they would humbly advise His Majesty that the appeal should be allowed and the conviction quashed and now give their reasons for tendering such advice.

The facts were really not in dispute. The appellant is a captain in the Royal Artillery and was acting as *liaison* officer with the R. A. F. at Tal Qali aerodrome. On 14th July last year, which was the third day of the invasion of Sicily he parked a truck, a vehicle used in His Majesty's service, near a house which he had occasion to visit. On returning to the truck some time afterwards he saw the lad whose arrest formed the subject of the charge on the truck. According to the appellant the lad was in the truck and he saw him through the windscreen. The lad's evidence was that he was not in the truck, but was standing on the running board with his hands behind his back looking at the speedometer and that he had been so standing for about 5 minutes. Whether the Court believed the appellant's evidence on this point or preferred the somewhat surprising account given by the lad is immaterial, for it is common ground that he was at least on some part of the truck. On seeing the appellant approach the lad ran away and the appellant chased and caught him. Unfortunately the appellant lost his temper and hit the lad in the face and kicked him. He arrested him and took him back to the truck and put him into it. He then discovered some cigarettes were missing and that about 20 gallons of petrol had been taken out of the tank which was empty. The lad denied all knowledge of either the cigarettes or the petrol, but the appellant told him that he was taking him to Valletta police station. On the way towards Valletta they met a policeman and the appellant inquired of him where there was a police station, but then according to his evidence, realising that it was time he went on duty, he drove to the aerodrome and handed over the lad to the Corporal on duty at the guard room and ordered him to detain him till the Military Police came for him. Again at the guard room he assaulted the boy. The subsequent history is really immaterial for the determination of this appeal, but it appears that the arrest caused considerable excitement in the neighbourhood which led to an Inspector of Police visiting the appellant and demanding that the boy should be released. A somewhat undignified altercation took place into which it is unnecessary to inquire in detail; it is enough to say that later in the evening the boy who had meanwhile been removed by order of the Provost Marshal to Hamrun police station was on somebody's order released. As a result of the treatment he received from the appellant the boy sustained slight injury amounting according to the doctor's evidence to a scratch near the corner of his eye and a small scar or bruise on the leg. Had the appellant been charged with assault he would have had no defence; he would no doubt have been properly convicted and awarded a suitable punishment for that offence. It is they hope hardly necessary for their Lordships to emphasise that a person in uniform, be he officer, N. C. O. or private, is no more than anyone else entitled to assault another subject of the King whether in peace or time of war. But that was not the offence for which the appellant was convicted. He was charged and convicted under Article 85 of the Criminal Laws which makes it an offence to arrest, detain or confine any person without a lawful order from the competent authorities, saving the case where the law authorises private individuals to apprehend offenders. Now at this time the Malta Defence Regulations 1939 were in force throughout the Island. Those Regulations derive their statutory effect from section 4, sub-section (1) of the Emergency Powers (Defence) Act, 1939 and the Emergency Powers (Colonial Defence) Order in Council, 1939, made thereunder. Under Regulation 26 it is an offence to impair the efficiency or impede the working of any vehicle used or intended to be used for the purpose of any of H. M. forces. Regulation 35 provides that no person shall unlawfully enter or board any vehicle, vessel or aircraft used or appropriated for any of the purposes of H. M. service

and if any person is found in any vehicle, vessel or aircraft on any occasion on which he has entered or boarded it in contravention of this paragraph then without prejudice to any proceedings which may be taken against him he may be removed by an authorised officer, which by Regulation 4 means a commissioned officer in any of H. M. forces, from the vehicle, vessel or aircraft. Then by Regulation 72, among other persons, any member of H. M. forces acting in the course of his duty as such may arrest without warrant any person whom he has reasonable ground for suspecting to have committed a war offence. A war offence is an offence against any of the Regulations. Now it is clear that the appellant had reasonable grounds for suspecting that the boy had committed a war offence; he was seen on the truck and therefore was committing a breach of Regulation 35. The prohibition contained in the Regulation is absolute, no question of intent or state of mind is involved. It follows that the appellant as a member of H. M. forces acting in the course of his duty as such was entitled under Regulation 72 to arrest him without warrant. The Attorney-General submitted that the Court was justified in thinking that he arrested the boy because he suspected him of stealing cigarettes which were his and not Government property and that accordingly there could be no justification for his action. But the facts show that he chased and arrested the boy before he knew that his cigarettes were missing and also before he knew that petrol had been taken from the tank, so that it is unnecessary to consider whether he had reasonable grounds for suspecting that the boy had been a party at least to the theft of petrol which would have been another war offence under Regulation 26. As the Court apparently delivered no reasoned judgment their Lordships are without information as to the grounds upon which they came to the conclusion that the appellant had been guilty of an offence under Article 85, but from the course of the trial it appears as though they must have addressed their minds solely to the question whether in arresting the boy he acted without authority, that is as a private person who was not authorised by law to apprehend an offender. The whole case for the appellant was that Article 85 had no application because whether or not the appellant was to be regarded as a private person he had authority under the Defence Regulations to effect an arrest. Consequently there was no illegal assumption of a power which did not belong to him. The facts do not appear to admit of any other conclusion and their Lordships therefore cannot but think that the Court acted on a misapprehension of the law and failed to take into account the powers conferred on the appellant by the Defence Regulations. The principles upon which this Board acts in advising His Majesty to review proceedings in Courts of criminal jurisdiction were laid down in In re *Abraham Mullory Dillet*[1] and have recently been restated so that there is no necessity to repeat them here. It is enough to say that if a conviction has resulted from regarding as criminal an act which is authorised by law that does amount to a breach of natural justice, because it means that there has been a conviction for what the law does not recognise as an offence. These are the reasons which moved their Lordships to tender the humble advice to His Majesty which they announced at the close of the argument.

Solicitors for appellant: *Norton, Ross, Greenwell & Co.*
Solicitors for the King: *Burchells.*

V. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

M. A. P. Palanichami Nadar .. *Petitioner**

v.

The Governor-General of India in Council, represented by the General Manager, South Indian Railway, Trichinopoly .. *Respondent.*

Limitation Act (IX of 1908), Article 31—Suit against railway company for compensation for loss of goods consigned for transit—Starting point of limitation.

1. (1887) 12 A.C. 459.

* C. R. P. No. 1749 of 1944. 14th September, 1945.

For a suit against a railway company for compensation for non-delivery of goods consigned for transit, time under Article 31 of the Limitation Act (period of one year from date when the goods ought to have been delivered) begins to run from after the definite refusal or declaration of inability to deliver by the responsible railway company.

Jugal Kishore v. *Great Indian Peninsular Railway*, (1922) I.L.R. 45 All. 43; *M. & S. M. Railway* v. *Bhimappa*, (1912) 23 M.L.J. 511; *S. I. Railway Co.* v. *Narayana Iyer*, (1923) 46 M.L.J. 302 and *North-Western Railway* v. *Maharajadhiraj Kameshwar Singh Bahadur*, (1932) I.L.R. 12 Pat. 67, followed.

Secretary of State v. *Dunlop Rubber Co.*, (1925) I.L.R. 6 Lah. 301, dissented from.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Madura, in S. C. S. No. 181 of 1943.

V. Ramaswami Aiyar for Petitioner.

S. S. Ramachandra Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This petition arises out of a small cause suit instituted by the plaintiff who is the petitioner here for compensation for non-delivery of goods consigned for transit. The goods were consigned for being sent from Colombo to Madura. The consignee was the Colombo Government Railway, but part of the journey had to be covered over the South Indian Railway belonging to the respondent company. There were four consignments of arecanuts and when they were delivered, 15 bags out of those consignments were short. The petitioner carried on correspondence with both the companies, as a result of which 11 bags were found and delivered, and there was an ultimate short delivery of 4 bags. It is for the value of those four bags at Rs. 110 per bag that the suit was laid against the South Indian Railway Co. The four bags that were short consisted of two bags out of the first consignment and two bags out of the fourth consignment. With reference to the two bags of the first consignment, the plaintiff's case was that he was informed by the Ceylon Government Railway that the entire consignment had been delivered in good order by that company to the South Indian Railway Co. and that fact had also been notified to that company by letter dated 9th January, 1943. The plaintiff, therefore, proceeded upon the footing that the South Indian Railway Co., was liable to make good the loss sustained by him on account of the non-delivery of the two bags out of the first consignment.

As regards the two bags in the fourth consignment, the plaintiff claimed the value thereof, but the defendant company's case was that the entire consignment had been delivered and acknowledged on behalf of the plaintiff and that there was no short delivery in that case. The plaintiff's case, so far as these two bags of the fourth consignment are concerned, must, I think, fail. In Ex. D-2, the delivery register, P. W. 1, the clearing agent of the plaintiff signed in token of having received all the 20 bags of that consignment. It is apparently usual in cases where there is short delivery to make a note thereof in the delivery register. Such a note was made in the case of the first consignment in Ex. D-1. The fact that in Ex. D-2, the receipt of all the bags was acknowledged and no such note as exists in Ex. D-1 was made clearly establishes that there was no short delivery in that case. The plaintiff's learned advocate contended that P. W. 1 discovered the shortage sometime later and brought it to the notice of the company's clerk and he also referred to the fact that in the Gate Pass Book the exact quantity of bags that passed the gate would appear and from that the quantity of consignment that was delivered could be gathered. Although the plaintiff gave notice to the defendant for the production of certain documents, he did not ask for the production of the Gate Pass Book. Having regard to all these circumstances I find no merit whatever in the plaintiff's case relating to the alleged short delivery of two bags out of the fourth consignment.

With regard to the short delivery of two bags in the first consignment, two grounds are urged against the plaintiff's claim on behalf of the defendants. The first is that there was no cause of action in respect of the alleged short delivery against the respondent company having regard to the language of section 80 of the Indian Railways Act. The second objection is that the claim of the plaintiff in respect

of this item is barred by limitation under Article 31 of the First Schedule of the Limitation Act.

Section 80 of the Indian Railways Act provides that a suit for compensation for loss of goods, where the goods were booked over the railways of two or more administrations, may be brought either against the railway administration to which the goods were delivered by the consignor thereof or against the railway administration on whose railway the loss occurred. The contention of the advocate for the respondent is that ordinarily a suit for compensation for non-delivery can be instituted only against the contracting, or "forwarding company," as it is called in the Railway parlance; but since in several cases it will be difficult for the consignor to locate the place of the loss, precisely, option is given to him, if he can prove that the loss occurred on the railway of the delivering company, to sue the delivering company in respect of the said loss. It is argued on the authority of *Chunnilal* v. *Nizam's Guaranteed State Railway Co., Ltd.*[1] that the forwarding company does not contract with the consignor of goods as the agent of the delivering company and that the delivering company is really the agent of the forwarding company. This position is not disputed by Mr. Ramaswami Iyer who appears for the petitioner. He concedes that he could only proceed against the respondent if he could bring the case within the ambit of section 80. He also concedes that the burden of proving loss by the respondent is upon him but his position is that he has, as far as he was able, proved that the loss occurred not on the Ceylon Government Railway, but on the South Indian Railway. It is, therefore, unnecessary to examine the decision referred to above and some other decisions which were cited in the same connection. To start with, it was definitely averred in the plaint, paragraph 10, that the plaintiff had given notice to the Ceylon Government Railway on 5th March, 1943, and that he had received a reply stating that the entire goods had been safely delivered to the defendant company. This specific averment was not controverted or denied in the written statement of the respondent, nor was anything stated in answer thereto. The letter of the Ceylon Government Railway is Ex. P-5 dated 13th March, 1943. In that letter, the Ceylon Government Railway Co. stated that the consignment of arecanuts as per invoice No. 64 of 8th June, 1942 (*i.e.*, the first consignment) had been correctly given over to the South Indian Railway Co., Ltd., on 12th June, 1942, and the Chief Commercial Superintendent, Trichinopoly, had been informed accordingly on 9th January, 1943. In the notice dated 21st February, 1944, served by the plaintiff's pleader upon the defendant in S. C. S. No. 181 of 1943, the plaintiff required the production at the hearing of the suit, *inter alia*, of all the correspondence that passed between the defendant and the Ceylon Government Railway Manager, regarding the receipt of the consignments mentioned in the plaint. It would appear that no affidavit was filed in answer to this notice, nor was any statement made as to the circumstances in which the documents called for were not, or could not be, produced. It cannot be denied that these documents were in the possession and power of the defendant and that they were not only relevant but important documents which would have furnished valuable evidence in the case. The conduct of the defendant in keeping back these documents cannot in the circumstances be justified. Further, from the correspondence filed in the case, it is obvious that the petitioner was endeavouring from the commencement to get some satisfactory answer from the South Indian Railway Co., after the receipt of Ex. P-5, with regard to the two bags that were missing, and to each of the inquiries that he was making, the company was replying saying that the matter was under inquiry or still under inquiry and a further reply might be awaited. In some of these notices, it was stated that if in the meanwhile the petitioner took the matter to Court, he would be liable for the entire costs of the company in the said proceeding. The correspondence went on in this strain until 18th December, 1943, on which date by Ex. P-14 the respondent company informed the petitioner that there was no trace of the remaining two bags on the line of the South Indian Railway Co., and they further added this :

---

1. (1906) I.L.R. 29 All. 228 (F.B.).

"In this connection I have to point out to you that the claim in this case is now barred by limitation under Articles 30 and 31 of the Limitation Act and as such no claim in respect of the alleged loss is admissible."

The suit out of which this present petition arises was filed on 11th December, 1943, about a week prior to the receipt of this notice. These facts will be more relevant in connection with the question of limitation which will be dealt with presently; but they are mentioned here to show that the respondent company had entered into protracted correspondence in the matter and in spite of the notice to produce the same the company had failed to do so. The contention of the learned advocate for the respondent is that under section 80 of the Indian Rilways Act, the company is not bound to produce any evidence, but the entire burden was upon the consignor to prove loss in a conclusive manner especially since the suit was against the delivering company and not the contracting or forwarding company. When goods have been consigned for transport from one place to another over two railways and there is evidence to show that they reached a particular midway station from where the jurisdiction of the delivering railway company commences and they were duly handed over to the delivering company in good order and the goods have not reached the destination, the only possible conclusion is that the goods were lost and that they were lost on the railway of the delivering company. The respondent does not dispute the genuinenes or truth of the statement contained in Ex. P-5. He has not produced, as already pointed out, the letter dated 9th January, 1943, which was sent by that company notifying the fact of the delivery of the entire consignment in good order to the South Indian Railway Co. There must have been some further correspondence in the matter between the two companies and that correspondence has not been produced in spite of notice. In these circumstances, I find no difficulty in holding that the petitioner has succeeded in proving that the loss occurred on the railway of the delivering company and that consequently under section 80 of the Indian Railways Act the suit is maintainable against the delivering company and the claim of compensation in respect of short delivery is sustainable.

The more important question in the case is that of limitation. Article 31 provides a period of one year from the date when the goods ought to have been delivered. This expression "when the goods ought to have been delivered" occurring in the third column of Article 31 of the first schedule has been the subject of consideration in numerous cases that have arisen in Courts. I shall deal with a few of them. In *Jugal Kishore* v. *Great Indian Peninsular Railway*[1], Stuart, J., and Sulaiman, J., (as he then was), said :

"Article 31 fixes one year from the date when the goods ought to have been delivered and applies to suits to recover compensation for non-delivery. It is to be noted that in the present case no time was fixed for the delivery of goods, and the correspondence between the parties shows that the matter was being inquired into and that there was no refusal to deliver, up to well within a year of the suit. In the circumstances of the case we are unable to hold that the suit was instituted more than a year from the expiry of a reasonable time within which the goods should have been delivered. This view is fully supported by the case of the *M. & S. M. Railway* v. *Bhimappa*[2]."

In another place, the learned Judges said that they would not recognise any inflexible rule that time must begin to run from the expiry of the ordinary period of transit. There are two decisions of this Court which have taken a similar view. The first is *M. & S. M. Railway* v. *Bhimappa*[2] referred to in the Allahabad case just cited. There, Sir Ralph Benson, O.C.J., and Sankaran Nair, J., observed :

"No time has been fixed for the delivery of the goods and the correspondence between the parties shows that the matter was being inquired into and the suit was brought within one year from the date of refusal to deliver. We are unable to say that the plaintiffs delayed more than one year from the expiry of a reasonable time within which in the circumstances of the case the goods should have been delivered."

This case was followed in the *S. I. Railway Co.* v. *Narayana Aiyar*[3], where it was held that the time would begin to run from when the defendant company finally said that the goods would not be delivered.

---

1. (1922) I.L.R. 45 All. 43.
2. (1912) 23 M.L.J. 511.
3. (1923) 46 M.L.J. 302.

As against these decisions all tending one way, learned counsel on behalf of the respondent has drawn my attention to a number of decisions, most of which have no bearing upon the present point. There are only three out of those cases which need be referred to. The first is *Mutsaddilal* v. *Bombay Baroda and Central India Railway Co.*[1] The facts of the case are entirely different, but it contains one passage at all events which supports the petitioner's contention. On page 393 of the report is found the following observation :

"It is by reason of the non-delivery of the bags that he sustained the loss for which he seeks to be compensated,"

thus showing that the cause of action to the petitioner consists in such cases in the non-delivery of the bags, or to put it in other words, the cause of action arises when the petitioner is made aware that there will be no further delivery of the undelivered part of the consignment. The second case cited by the respondent's advocate is a decision of the Patna High Court in *Gopiram Gowri Shankar* v. *Great Indian Peninsular Railway Co.*[2] In this case, the Judges were of the opinion that where a great part of a consignment had been delivered on a certain day there was ordinarily no necessity to enter into evidence on the question of when the balance of the consignment ought to have been delivered, because the time when the consignment as a whole ought to have been delivered is manifestly the time when the greater part of the consignment arrived at its destination. A later decision of the same High Court is in *Bengal and North-Western Railway* v. *Maharajadhiraj Kameswar Singh Bahadur*[3]. That was a decision of a Division Bench and there the following observation occurs :

"The plaintiff, on the 23rd October, wrote to the defendants of the loss. He was justified in waiting to bring his suit until the defendants had made it clear that they had no intention of delivering the goods. Had the position been reverse, the defendants would not have hesitated to contend that a suit was premature which did not give them a reasonable opportunity of fulfilling the terms of the contract. The defendants by a deliberate process of ignoring the plaintiff's repeated requests for attention to his claim misled him into delaying his suit and it is not open to them now to contend that the suit has been brought too late."

In this decision, the earlier decision of the same Court, *Gopiram Gowri Shankar* v. *Great Indian Peninsular Railway Co.*[2] was not, however, referred to. It must be further noted that *Bengal and North-Western Railway Co.* v. *Maharajadhiraj Kameswar Singh Bahadur*[3] was a case where a part of the consignment had been delivered on an ealier date and a part remained to be delivered in respect of which the company was for a long time making inquiries—facts which are similar to the facts of the present case. Then we have the decision in *Secretary of State* v. *Dunlop Rubber Co.*[4] which is the only case which really supports the contention put forward on behalf of the respondent. As against that decision we have the authority of the four decisions already referred to, *Jugal Kishore* v. *Great Indian Peninsular Railway*[5], *Madras and Southern Mahratta Railway* v. *Bhimappa*[6], *South Indian Railway Co.* v. *Narayana Aiyar*[7], and *Bengal and North-Western Railway* v. *Maharajadhiraj Kameswar Singh Bahadur*[3]. In this state of affairs, the volume of authority is definitely in favour of the view propounded on behalf of the petitioner. The construction placed upon Article 31 that time begins to run from after a definite refusal or declaration of inability to deliver by the responsible railway company has to be upheld.

The result of these findings will be that so far as the two bags relating to the fourth consignment are concerned, the plaintiff's suit will be dismissed. With reference to the two bags of the first consignment, the order of the Subordinate Judge of Madura will be set aside and the plaintiff's suit will be decreed for a sum of Rs. 144 at the rate of Rs. 72 per bag which is the rate found by the learned Subordinate Judge under the fifth issue. The parties will give and receive proportionate costs throughout.

K.S. *Petition allowed in part.*

---

1. (1920) I.L.R. 42 All. 390.
2. (1927) 103 I.C. 383.
3. (1932) I.L.R. 12 Pat. 67.
4. (1925) I.L.R. 6 Lah. 301.
5. (1922) I.L.R. 45 All. 43.
6. (1912) 23 M.L.J. 511.
7. (1923) I.L.R. 46 M.L.J. 302.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR.

M. T. Pankajammal and another .. *Appellants**

v.

M. T. Parthasarathy Aiyangar .. *Respondent.*

Hindu Law—Settlement deed in favour of wife—Provision by settlor in the event of the wife pre-deceasing the settlor—Adopted son's right in the property covered by the deed.

A Hindu executed a settlement deed in favour of his wife for her maintenance and also provided that in the event of the wife pre-deceasing him he shall enjoy the property covered by the settlement deed and that a son to be adopted shall enjoy them after their lifetime in the capacity as son. The executant married again on the death of his wife and a natural son was born to him. In a suit by the adopted son against the surviving widow and natural born son for recovery of possession of the property covered by the settlement deed,

Held, (1) the settlement deed did not confer any right *in presenti* on the adopted son and as such he must share it as an adopted son with his step-mother and after-born brother;

(2) if the settlement deed did confer a right *in presenti* it would be the property of the adopted son and though ancestral in his hands as regards his sons, his after-born brother and step-mother would have no right whatsoever in it.

Nagalingam Pillai v. *Ramachandra Tevar*, (1901) 11 M.L.J. 210 : I.L.R. 24 Mad. 429; *Janakiram Chetty* v. *Nagamony Mudaliar*, (1925) 50 M.L.J. 413 : I.L.R. 49 Mad. 98 and *Velayudhan Chettiar* v. *Commissioner of Income-tax*, (1945) 1 M.L.J. 149 : I.L.R. (1945) Mad. 549, referred to.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O.S. No. 1581 of 1941.

Ch. Raghava Rao and *M. E. Rajagopalachari* for Appellants.

T. M. Venugopala Mudaliar for Respondent.

The Court delivered the following

JUDGMENT.—The property in suit originally belonged to one M. Thiruvengadachariar. In 1930 he was aged about 62 and he had no issue living at the time. His wife Alangarammal was alive. He resolved to take the present respondent, the plaintiff in the lower Court, in adoption, and had fixed that the adoption should take place on the 13th July, 1930. Two days prior to that date, *i.e.*, on the 11th July, 1930, he executed a settlement deed marked Ex. P-1, on a construction of which the decision in this case depends. The deed itself was executed in favour of Alangarammal, his wife. The executant says:

"I am now nearly 62 years of age and have become old. Since you are my wife and on account of love and affection which I have towards you, I am bound to maintain you till your lifetime and further since I have made arrangement to take in adoption on 29th Ani of this year (13th July, 1930), Parthasarathi, minor son of Gomatam Krishnaswami Aiyangar, aged about ten years, and since I have for similar reasons decided as it is necessary that an arrangement should be made, during my lifetime itself, for your food, clothe, etc., expenses, I have in pursuance thereto, executed wholeheartedly in your favour this settlement deed."

It is recited that Alangarammal had been put in possession of the property and that she should utilise the income from the property for her maintenance and other expenses. Then occur these words:

"After your lifetime, the aforesaid boy whom we are going to adopt shall take possession, hold and enjoy the aforesaid house and site with absolute right and title. You shall enjoy only the rent income from the aforesaid house, as mentioned above, till your lifetime, and you shall have no power to subject the aforesaid house and site to any encumbrances or alienations such as mortgage, sale, etc. In the event of your death during my lifetime itself, I shall enjoy the aforesaid house and site, subject to the conditions aforesaid."

On the 13th July, 1930, the plaintiff-respondent was taken in adoption by Thiruvengadachariar who also executed a deed in favour of the father of the adopted boy who was then a minor. After reciting the adoption the deed provides as follows:

"Hereafter, my adopted son shall remain with me in the family and enjoy, exclusive of the house and site given as and for the maintenance expenses of my aforesaid wife Alangarammal under the registered settlement deed, dated 11th July, 1930, the remaining entire immoveable and moveable properties in my possession, in the capacity as son, with absolute right and title."

* C. C. C. A. No. 12 of 1945. 14th September, 1945.

Alangarammal died in 1931. But Thiruvengadachariar survived her, married another wife, the first defendant (first appellant) and begot a son by her, the second defendant (second appellant) in 1934 and eventually died in April 1941. The third defendant is not a material party. The suit out of which the present appeal arises was filed in July, 1941, by the adopted son against the surviving widow and the natural born son for recovery of possession of the property covered by the settlement deed. In the written statement the defendants pleaded that the alleged deed of settlement read with the deed of adoption conferred upon the plaintiff only such rights as he would have as a member of a joint family and therefore on the death of Thiruvengadachariar the plaintiff would have to share the property with the defendants. In paragraph 5, it was also pleaded that the settlement deed was a maintenance arrangement and that it did not confer any right on the plaintiff.

The learned Additional City Civil Judge held that under the settlement deed the plaintiff acquired rights to the suit house on the death of his adoptive parents and the defendants were not entitled to any rights therein. A decree was therefore passed in favour of the plaintiff for possession. Defendants 1 and 2 appeal.

I do not agree with the City Civil Judge in the construction of the settlement deed Ex. P-1. He overlooked certain material circumstances which have a bearing on the construction of the deed. It is important to notice that the deed itself purports to be only in favour of Alangarammal. The plaintiff who was then a minor was not a party to that deed, though no doubt he is mentioned in the body of the document as the person who was going to be adopted by the executant. The object of the execution of the deed is unambiguously declared as the necessity to provide for the maintenance and other expenses of Alangarammal, the wife of the executant. The settlement itself is in favour of Alangarammal for her lifetime and in paragraph 3 of the document the executant makes it clear that neither he nor his heirs shall have right to disturb her in the enjoyment of the aforesaid house which had been settled on her as and for her maintenance and other expenses.

No doubt in the deed there is a reference to what is to happen after the lifetime of Alangarammal. In the natural course of events the executant thought that he would die first and so provides that the property shall be enjoyed by his wife during her lifetime. But at the same time he also contemplates the contingency of the wife predeceasing him and provides for that event, as follows, namely, in the event of her death during his lifetime he shall enjoy the aforesaid house and site subject to the conditions aforesaid. Reading the entire document it is clear that the executant did not intend that the adopted boy should have any right or interest in the property so long as he or his wife was alive. He obviously intended that the boy whom he was going to take in adoption should succeed to the property with absolute rights according to the ordinary rules of devolution. One thing is clear; the plaintiff did not get any rights *in presenti* under the settlement deed. This explains why the settlement deed was not executed in favour of the plaintiff also represented by his natural father as guardian. The deed of adoption executed two days subsequent to the date of settlement gives an indication as to the intention of Thiruvengadachariar. In paragraph 4 of the adoption deed Ex. P-2 he refers to the fact that his remaining properties should be enjoyed by the adopted son " in the capacity as son" with absolute right and title. It was conceded by the learned advocate for the plaintiff-respondent that the defendants would be entitled to share with the plaintiff in properties other than the property covered by the settlement deed. In my opinion, no distinction can be drawn between those properties and the property which is the subject-matter of the settlement deed. What Thiruvengadachariar contemplated was the adopted boy succeeding to the entire estate as adopted son but with this reservation that in respect of the property covered by the settlement deed, his wife was to have a life estate to enable her to maintain herself without depending on the generosity of the adopted son.

This conclusion of mine is enough to dispose of the appeal. But Mr. Raghava Rao has raised a point of law that even assuming that there was a grant *in presenti*

in favour of the plaintiff under the settlement deed, the presumption would be that the plaintiff took it as ancestral property and therefore on the birth of the second defendant he had to share the property with him. He cited for this proposition the well-known decisions in *Nagalingam Pillai* v. *Ramachandra Tevar*[1], *Janakiram Chetty* v. *Nagamony Mudaliar*[2] and the recent decision in *Velayudhan Chettiar* v. *Commissioner of Income-tax*[3]. The general proposition is well established in Madras but the fallacy underlying the argument of Mr. Raghava Rao is that when the decisions describe the property in the hands of the son as ancestral, they do so with reference to the descendants of the son who acquire by birth a right in the paternal estate. If the settlement deed did confer a vested remainder on the plaintiff, the position would be that he would become the owner of the property. It would no longer be his father's property on the birth of the second defendant. The second defendant no doubt would acquire a right by birth in the property of his father but he would not acquire any such right in what is strictly the property of his brother. Mr. Raghava Rao himself recognised the logical result of the acceptance of the proposition for which he contended. It would mean that even after the settlement in favour of the son the property in the hands of the son would continue to be the property of the coparcenary including the father himself, the settlor. The position is so anomalous that it cannot be accepted. If it were necessary I would on the circumstances above adverted be prepared to hold that there was no intention on the part of the executant that the son to be adopted had to share the property with any son that may be born to him subsequently.

But as I have already held on a construction of the settlement deed, the plaintiff became entitled to the property only on the death of his father and as an adopted son, according to Hindu Law, he had to share it along with the after-born brother and his step-mother. The plaintiff has not prayed for partition and in fact he could not do so as there are other properties to be partitioned which are not included in the suit. The suit as framed has to be dismissed.

I accordingly allow the appeal, set aside the decision of the City Civil Judge and dismiss the suit with costs. The appellants will be entitled to the costs of the appeal from the respondent.

V. P. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Duraiswami Koundan .. *Accused.**

Criminal Procedure Code (V of 1898), section 342—Questioning accused under—Proper method.

The object of questioning the accused under section 342, Criminal Procedure Code, is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. Unfortunately, since the Privy Council decision in *Dwarkanath Varma* v. *The King-Emperor*, (1933) 64 M.L.J. 466 (P.C.), Courts have cultivated the habit of summarising the whole evidence and asking the accused what he has to say with regard to it. A summary at considerable length tends to defeat the object of section 342, Criminal Procedure Code, because the attention of the accused is not drawn thereby to the salient features of the prosecution case that seem to call for some explanation. To an ordinary straightforward account of witnesses of an actual occurrence no detailed questionings would be necessary. On the other hand, if, for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime he should be given an opportunity of offering an explanation of the presence of that article in his house.

Giving a long precis of the whole prosecution evidence and asking the accused what he has to say with regard to it is an abuse of the provisions of section 342 of the Criminal Procedure Code and a bad example of a misunderstanding of the Privy Council decision.

Trial referred by the Court of Session of South Arcot division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 27 of 1945, dated 19th July, 1945 and appeal by the said prisoner.

1. (1901) 11 M.L.J. 210 : I.L.R. 24 Mad. 429.
2. (1925) 50 M.L.J. 413 : I.L.R. 49 Mad. 98.
3. (1945) 1 M.L.J. 149 : I.L.R. (1945) Mad. 549.

* R. T. No. 127 of 1945. 21st September, 1945.
(Crl. Appeal No. 474 of 1945).

G. N. Chari for Accused.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

The Judgment of the Court was delivered by

Horwill, J.—The appellant has been convicted by the Sessions Judge of South Arcot of an offence punishable under section 302 of the Indian Penal Code and has been sentenced to death.

* * * * * *

[After discussing the evidence and confirming the conviction and sentence their Lordships added] :

Before closing this judgment mention ought to be made of the manner in which the committing Magistrate questioned the accused. The object of questioning an accused by the Court under section 342 of the Criminal Procedure Code is to give the accused an opportunity of explaining the circumstances that appear against him in the evidence. Unfortunately, since the Privy Council decision in *Dwarkanath Varma* v. *The King-Emperor*[1], Courts have cultivated the habit of summarising the whole evidence and asking the accused what he has to say with regard to it. A summary at considerable length tends to defeat the object of section 342 of the Criminal Procedure Code ; because the attention of the accused is not drawn thereby to the salient features of the prosecution case that seem to call for some explanation. To an ordinary straightforward account of witnesses of an actual occurrence no detailed questions seem necessary. On the other hand, if, for example, some article is found in the accused's house which points in an emphatic manner to the accused's responsibility for the crime, he should be given an opportunity of offering an explanation of the presence of that article in his house. In his questions to the accused the committing Magistrate has given a long precis of the whole prosecution evidence, which is a particularly bad example of a misunderstanding of the above Privy Council decision and is an abuse of the provisions of section 342 of the Criminal Procedure Code. Fortunately, in a straightforward case like this, no injury could have resulted to the appellant from this examination.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Vadlamanneti Damodara Rao .. *Appellant**

v.

The Official Receiver, Kistna and another .. *Respondents.*

Limitation Act (IX of 1908), Schedule I, Article 182 (5)—Execution petition "closed"—Continuance of attachment—Fresh application for execution filed beyond six years—Whether can be treated as continuation of previous application.

On 21st September, 1932, the respondent obtained a decree against the appellants and their father for the payment of a certain amount. On 22nd January, 1935, the respondent filed an application for execution of the decree. Another creditor of the defendants had obtained a decree against them in another suit and had already applied for execution by the attachment and sale of the properties of the judgment-debtors. The object of the respondent in filing his execution petition and in applying for attachment was to obtain rateable distribution of the properties already attached by the other decree-holder. Some of the attached properties were sold in the execution petition filed by the other creditor and the respondent obtained his share of the proceeds, but the attachment continued in respect of the unsold properties. On 5th November, 1936, the Court passed an order in both the execution petitions closing them, the order being merely the word "closed," but the attachment continued. On 22nd December, 1942, the respondent filed another application for execution. It appeared that the properties which the respondent sought to embrace in his application were the same properties which were referred to in the earlier petition and what he wanted was rateable distribution of the sale proceeds of the unsold properties under attachment.

Held, that by the order of the 5th November, 1936, the earlier petition was merely "closed" for statistical purposes and the order was not a final order, and that the later application put in by the respondent was not barred by limitation as it was merely a continuation of the earlier application.

Decision of Chandrasekhara Aiyar, J., affirmed.

---

1. (1933) 64 M.L.J. 466 (P.C.).

*L. P. A. No. 22 of 1945. 24th August, 1945.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Chandrasekhara Aiyar, dated 11th January, 1945, and passed in A. A. O. No. 43 of 1944, preferred to the High Court against the order of the District Court of Kistna at Chilakalapudi, dated 25th August, 1943, and made in E. P. No. (unfiled) of 1942 (A. No. 7470 of 1942) in O. S. No. 621 of 1932, on the file of the Court of the District Munsiff of Bandar).

B. V. Ramanarasu for Appellant.

P. Sivaramakrishniah for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—The question in this appeal is whether a decree obtained by the respondent has become barred by the law of limitation.

On the 21st September, 1932, the respondent obtained a decree against the appellants and their father for the payment of Rs. 2,832-12-0 with interest and costs. On the 22nd January, 1935, the respondent filed an application for execution in the Court of the District Judge of Kistna. This was numbered as Execution Petition No. 26 of 1935. Another creditor of the defendants had obtained a decree against them in Original Suit No. 5 of 1931 and had already applied for execution by the attachment and sale of the properties of the judgment-debtors. This application was numbered as Execution Petition No. 172 of 1932. The object of the respondent in filing Execution Petition No. 26 of 1935 was to obtain rateable distribution of the properties already attached by the decree-holder in O. S. No. 5 of 1931. He asked for an order for attachment, but added a prayer for rateable distribution. Some of the attached properties were sold in Execution Petition No. 172 of 1932 and the respondent obtained his share of the proceeds. The attachment continued in respect of the unsold properties.

On the 5th November, 1936, the District Judge passed an order in both the execution petitions closing them, the order being merely the word "closed." This was obviously done in accordance with the very bad practice which then prevailed of Courts closing petitions for execution for statistical purposes. Although the petitions were "closed" the attachment continued and continued at all times material to this appeal.

On the 22nd December, 1942, the respondent filed another application for execution. As over six years had elapsed since the District Judge "closed" the respondent's first application, it was said that the new application was barred by limitation. The District Judge accepted this plea and dismissed the application. The respondent appealed to this Court and the appeal was heard by Chandrasekhara Aiyar, J. The learned Judge remanded the case to the District Court with the direction that there should be an inquiry as to whether the properties covered by the petition of the 22nd December, 1942, were the same as the properties covered by the previous petition. He indicated that in the event of the properties proving to be the same the execution Court should hold the later application to be within time. The appeal is from the learned Judge's judgment.

We have called for all the records from the lower Court and an examination of them shows that the properties which the respondent sought to embrace in his application of the 22nd December, 1942, are the properties which were referred to in the earlier petition and what he wanted was rateable distribution of the sale proceeds of the unsold properties under attachment. Unless the order of the District Judge of the 5th November, 1936, is to be read as a final order dismissing Execution Petition No. 26 of 1935, the application of the 22nd December, 1942, is in time.

We have already stated that the earlier petition was merely "closed" for statistical purposes. As pointed out in *Sivasubramaniam Chettiar* v. *Murugesa Mudaliar*[1] it is well-settled law that where a fresh petition is filed as the result of a former petition having been "closed" for statistical purposes, it is not regarded in law as

1. (1940) 1 M.L.J. 537.

being a fresh application but an application to revive or continue the former application. The order of the 5th November, 1936, was not a final order and the fresh application put in by the respondent must under the authorities be regarded as merely a continuation of the previous application. By the later application all he wanted was his share in the sale proceeds of the properties which still remained to be sold.

The decree-holder in Original Suit No. 5 of 1931 filed an application on the 3rd August, 1943, in continuation of his Execution Petition No. 172 of 1932 and this was allowed on the 23rd December, 1944. Throughout, the respondent's petitions have come before the Court together with the petitions of the decree-holder in Original Suit No. 5 of 1931.

We hold that the District Judge was wrong in dismissing the respondent's later application as being barred by the law of limitation and consequently we dismiss the appeal with costs.

The case will be remanded to the trial Court but in view of the fact that the properties admittedly are the same as the properties covered in the former petition, no further inquiry is necessary. The execution will proceed on this basis.

B.V.V. — *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Sha Hansraj Abayachand (deceased) and others .. *Appellants.**

Hoarding and Profiteering Prevention Ordinance (XXXV of 1943), section 13 (3)—Power to order confiscation—Limits—Refusal to sell certain goods on the ground that no stock was available—Refusal to sell extends to whole stock which can be ordered to be confiscated.

Where goods are asked for by a customer out of the stock believed to exist and the sale is refused on the ground that no stock is available, the refusal to sell extends to the entire stock of goods in respect of which the refusal is made ; and on a conviction of the dealer for contravening section 9 of the Hoarding and Profiteering Prevention Ordinance, the entire stock of goods for which enquiry was made can be ordered to be confiscated under section 13 (3) of the Ordinance.

Appeal against the order of the Chief Presidency Magistrate, Egmore, of the Court of the Presidency Magistrates, Madras, dated 9th March, 1945, and passed in C. C. No. 66 of 1945.

V. V. Srinivasa Ayyangar and *R. Tirumalai Tatachariar* for Appellants.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

The Court delivered the following

JUDGMENT.—The two appellants are the proprietor and the salesman of a shop in George Town and they have been convicted on two counts of offences punishable under section 13 (1) of the Hoarding and Profiteering Prevention Ordinance, read with section 114 of the Indian Penal Code in the case of the second appellant. The proprietor has been fined Rs. 1,500 on each of the two counts while the salesman has been fined Rs. 200 on each count. Confiscation of the stock has also been ordered.

The facts so far as they are necessary at this stage are that on 23rd June, 1944, two persons went to the shop, asked to be supplied with Cuticura Toilet powder, Krementz shirt studs, and playing cards. Each of them went independently and each of them received the same reply that no stocks were available. A search made very shortly afterwards by the Special Assistant Commercial Tax Officer showed that there were large stocks of these articles inside the premises to which the salesman had access. The explanation given by the salesman at the time to the searching officer was that he was not aware of the existence of these stocks, and it was only when the case came on for trial that the appellants revealed their defence. Two letters were produced, one purporting to have been written by the salesman to the proprietor as far back as February, 1944, asking for instructions for the disposal of five cases of goods which had arrived from Madura. According to a railway

* Crl. Appeal No. 277 of 1945. 16th October, 1945.

clerk examined as a defence witness these cases contained playing cards, powder, and soap and were despatched on 12th February, 1944, from Madura. According to the appellants these goods had been sent out of Madras in April, 1942, at the time of the invasion scare to Pudukotah and were sent back to Madras in February, 1944, after conditions became more settled. The answer of the proprietor to this enquiry by the clerk was dated 31st March, 1944 and according to it he was to keep the cases unopened until the proprietor's return in three or four weeks' time, after which he would check the contents and deal with them. The learned Magistrate regarded these two letters with considerable suspicion and he declined to accept the defence put forward, largely because the cases had not been kept intact by the salesman as directed by the proprietor; on the contrary, the goods were found open in the rooms where they were kept concealed.

On behalf of the appellants Mr. V. V. Srinivasa Ayyangar has pressed this defence; but it is significant that when the shop was raided by the Assistant Commercial Tax Officer no reference was made to the existence of these unopened cases, nor did the salesman suggest that he had stocks which he was unable to sell because they were awaiting unpacking by the proprietor and the fixing of their selling prices. If the salesman had produced this letter from his employer and shown the Assistant Commercial Tax Officer the unopened cases and given him this explanation, it is very doubtful whether this prosecution would have been made. I agree with the learned Magistrate in his rejection of these two letters. There can be no doubt from the evidence that P. Ws. 1 and 2 were deliberately refused the supply of goods by the salesman with full knowledge that he had adequate stocks available. It may be from the way in which P.Ws. 1 and 2 were careful to ask for these particular goods that they had been sent by the officers of the Supplies Department on information received that blackmarket transactions were going on, but this does not in my view affect the guilt of the appellants. On the facts there is no room for interference with the convictions.

The salesman has been convicted only of abetment, the learned Magistrate taking the view that he must have received his instructions from his proprietor and that in refusing supplies to purchasers he was acting under those instructions and was therefore guilty of abetment. Whether he was acting on his own initiative or whether he was acting only as an abettor is only of academic interest because the proprietor is in any event liable.

Regarding the sentences those imposed on the proprietor are undoubtedly severe but having regard to the offences and the large stocks available I am not prepared to say that they are excessive.

Regarding the orders of confiscation they have been attacked by Mr. Srinivasa Ayyangar on two grounds: firstly that in view of the substantial nature of the fines the confiscation amounts to an excessive punishment; and secondly, on the ground that there is no power to direct confiscation of the entire stock of the goods for which enquiry was made. Mr. Srinivasa Ayyangar's contention is that if confiscation was necessary it can be directed only in respect of one pack of cards, one set of studs, and one tin of toilet powder. If a prospective purchaser were to enter a shop and ask for the sale of a particular article in view on the counter or displayed in the window or show room, there would be room for the argument that the refusal to sell related only to the particular article pointed out by the prospective purchaser and of which the sale was required; but whereas in this case goods are asked for out of the stock believed to exist and the sale is refused on the ground that no stock is available, then I consider that the refusal to sell extends to the entire stock in respect of which the refusal is made. It is in evidence that there were in the shop in this case 67 dozen packs of playing cards and when supplies were refused on the ground that no stock was available, then the refusal extends to each and every pack of cards contained in that entire stock. This contention must be rejected and there remains only the severity of the penalty of confiscation.

Mr. Srinivasa Ayyangar has stated that the value of the stock of which confiscation has been ordered is approximately Rs. 8,000. The confiscation of this taken with the fines appears at first sight to be excessive, but there is evidence to show that illicit transactions in this shop were in all probability frequent. In addition to checking the stocks of these particular articles the Assistant Commercial Tax Officer examined other stocks also. He found that the stock books were far from being up to date, that price lists were not exhibited, and that large stocks of table knives, desert knives and other goods had not been brought to account at all. The annual turnover of this business according to the judgment of the learned Magistrate is Rs. $3\frac{1}{2}$ lakhs, so that the fine of Rs. 3,000 is less than 1 per cent. of the annual turnover. This is probably trivial when compared with the profits of all the illicit transactions which probably went on. In this view I am unable to agree that the order of confiscation taken with the fines is an excessive punishment. Severe it undoubtedly is but all the circumstances point to the necessity for a severe sentence. The appeal is accordingly dismissed.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BYERS.

Sokkammal .. *Petitioner**

v.

Arunachalam Pillai and others .. *Respondents.*

Court-fee and jurisdiction—Guardian furnishing accounts to Court which appointed him and examination of same by auditors—Suit by ward on attaining majority against the guardian for recovery of sums misapplied and misappropriated—Frame of—Valuation of plaint—Basis.

Where accounts have already been furnished by a guardian to the Court which appointed him and examined by auditors, the ward on attaining majority cannot sue that guardian for accounts but can sue only on the accounts already furnished for recovery of what is payable after surcharging and falsifying. The ward in such a suit must value and stamp his plaint on an *ad valorem* basis.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff of Tuticorin, dated the 26th day of August, 1943 and passed in O.S. No. 207 of 1942.

A. Swaminatha Aiyar for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT:—The plaintiff attained majority in 1939 and, after securing from the Court an assignment of the security bond which was taken from his guardian appointed by the Court, he has brought a suit for accounts and for the recovery of sums found to have been misapplied or misappropriated.

Mr. A. Swaminatha Aiyar rightly points out that as accounts have already been furnished to the District Court by his guardian and examined by auditors he cannot now sue for accounts but can sue only on the accounts already furnished for the recovery of what is payable after surcharging and falsifying. He valued his plaint at the notional figure of Rs. 200 and paid court-fee accordingly. In several paragraphs of his plaint he gave details of amounts misapplied and misappropriated, and these sums amount approximately to Rs. 5,800.

If his suit is for accounts he need not specify the amount he expects to receive; it is sufficient to pay court-fees on the relief of accounting and to pay court-fees later on the amount found due. But where the suit is to surcharge and falsify accounts already furnished and to recover specific sums, the plaintiff must value and stamp his plaint accordingly on an *ad valorem* basis. It follows that the lower Court had no jurisdiction and the plaint must be returned to the plaintiff for presentation to the proper Court. The petitioner will have her costs in this Court.

K.S. —— *Petition allowed.*

* C. R. P. No. 1518 of 1943. 3rd October, 1944.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Lala Punnalal and another .. *Appellants**

v.

Kasturichand Ramaji .. *Respondent.*

Tort—Malicious house search—Action for—Maintainability—Damages—Principles for assessment—Exemplary damages—If can be awarded—Existence of longstanding strained relations between parties—Is a ground for award of exemplary damages and not for refusing it—Quantum of damages—Power of High Court to interfere with in second appeal.

It cannot be said that there is no tort known as malicious house search. New invasion of rights may give rise to new classes of torts and there can be an action for maliciously procuring a house search.

Bajo Sahu v. *Chedi Barhi*, A.I.R. 1939 Pat. 89, considered and *Jai Pande* v. *Jaldhari Raut*, A.I.R. 1917 Pat. 43, referred to.

The award of exemplary damages for torts in cases where the defendant has acted contumeliously is sanctioned not only by the English law but also by decisions of the Madras High Court applying the Indian Law.

Venkatappayya v. *Ramakrishnamma*, (1931) 62 M.L.J. 107, and *Ramaswami Chettiar* v. *Suppiah Chettiar*, (1935) 69 M.L.J. 98 referered to. *Parvathi* v. *Mannar*, (1884) I.L.R. 8 Mad. 175, considered and observations in *Naganatha Sastri* v. *Subramania Iyer*, (1917) 32 M.L.J. 392 treated as *obiter* and not followed.

Where the defendant in an action for damages for malicious prosecution and for procuring a malicious house search is found to have been actuated by malice, the existence of strained relations between the parties for a long period is a ground for the award of exemplary damages instead of refusing it.

Though the High Court would not lightly interfere with a mere question as to the amount of damages, where the amount is substantially reduced by the first appellate Court on a wrong view, the error must be set right in second appeal.

Appeal against the decree of the District Court of Guntur in A.S. No. 414 of 1942, preferred against the decree of the Court of the Subordinate Judge of Guntur in O.S. No. 24 of 1941.

K. Kottayya for Appellants.

B. V. Ramanarasu for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal has been preferred by the plaintiffs against a reduction made by the District Judge in the amount of damages awarded to them by the Subordinate Judge in an action for damages for malicious prosecution and malicious house search. The correctness of the principle applied by the learned District Judge in reducing the amount is challenged by the appellants.

There is a memorandum of objections preferred by the first defendant to the effect that no damages ought to have been awarded at all and that, in any event, no damages could be allowed for the house search, as there is no such tort known to law.

Both the lower Courts have found that the prosecution and the search were malicious, that the plaintiffs are wealthy and respectable people and that the second plaintiff was a *purdhanashin* lady. The Subordinate Judge held that the first defendant moved the Magistrate for a search warrant and prosecuted the plaintiffs with intent to dishonour them and that he did so because of a longstanding enmity which impelled him to wreak his private vengeance. So he took the view that the case called for the award of exemplary damages, which he fixed at Rs. 2,000. But the learned District Judge allowed only Rs. 750 instead, Rs. 500 as damages for malicious prosecution and Rs. 250 as damages for malicious house search. He held that the long-standing strained relations between the parties justified the non-award of exemplary damages. While the Subordinate Judge decreed the plaintiffs' costs in full, the District Judge ordered proportionate costs of the suit and in appeal.

Taking the memorandum of objections first, it was contended that the award of exemplary damages was not known to Indian law and that our Courts have set

---

* S. A. No. 1980 of 1944. 17th September, 1945.

their faces against it. The decisions in *Parvathi* v. *Mannar*[1], and *Naganatha Sastri* v. *Subramania Iyer*[2] were quoted in support of this position. *Parvathi* v. *Mannar*[1] is a case of vindictive damages, which is different from exemplary damages. As pointed out in Clerk and Lindsell on Torts, 9th Edition, at page 119, exemplary damages are consolatory rather than penal, resting upon the principle that; where there is malice, the mental pain caused to the plaintiff must be taken note of and a solatium awarded for it. In *Naganatha Sastri* v. *Subramania Iyer*[2], the plaintiff brought a suit for defamation and left the question of damages in the hands of the Court. The Subordinate Judge awarded only nominal damages under the circumstances. Sadasiva Iyer, J., expressed the opinion that the plaintiff would have been better advised if he had treated the whole matter even in the beginning with indifference and that he should not have pursued the matter in the appellate Court after he had obtained a judgment in the first Court, or filed a second appeal. After having said all this he noticed an argument addressed by Mr. T. Rangachariar, that penal and exemplary damages ought to be awarded in such cases and dismissed it with this remark :

"I shall content myself with observing that the whole doctrine of penal and exemplary damages, is due to the illegitimate encroachment of the considerations of punishment by fine in criminal jurisprudence into the realms of civil litigation and I wholly deprecate the introduction of such complications of the English system into India."

The facts stated, clearly show that this observation of the learned Judge was purely *obiter*.

The award of exemplary damages in cases where the defendant has acted contumeliously is sanctioned not only by English law but also by decisions of this Court, applying the Indian law. For instance, in *Venkatappayya* v. *Ramakrishnamma*[3], Venkatasubba Rao and Pakenham, Walsh, JJ., gave exemplary damages in a case of malicious prosecution and raised the amount from Rs. 500 fixed by the lower Court to Rs. 1,500 fixed by themselves as adequate in the circumstances of the case before them. Finding that the conduct of the defendant before him was high-handed and his trespass wanton and malicious, Venkatasubba Rao, J., confirmed the award of exemplary damages in the decision in *Ramaswami Chettiar* v. *Suppiah Chettiar*[4], pointing out that in such cases the principle of *restitutio in integrum* did not apply.

The only support for the proposition that there is no tort known as the malicious house search is a decision of Wort, J., in *Bajo Sahu* v. *Chedi Barhi*[5]. There is however nothing like an exhaustive classification of torts beyond which Courts should not proceed. New invasion of rights devised by brain of man might give rise to new classes of torts. Apart from such a general consideration, the view taken by the learned Judge is contrary to the accepted view on the subject. It is pointed out in Clerk and Lindsell on Torts, page 666, that if a search warrant is improperly procured, an action would lie in respect of the entry, and reference is made to *Wyatt* v. *White*[6], where damages were allowed for the invasion of the plaintiff's premises and the seizure of his person in an action for maliciously procuring the issue of a search warrant. An earlier Bench decision of the Patna High Court in *Jai Pande* v. *Jaldhari Raut*[7] proceeds on the basis that there could be an action for procuring maliciously a house search.

Once we reach the position that exemplary damages could be awarded in a case of this kind, where the prosecution was definitely actuated by malice and the house search was procured with a malicious motive and where we find further that false evidence, oral and documentary, was adduced in support of the prosecution, the existence of strained relations between the parties for a long period was a ground for the award of exemplary damages instead of refusing it. The District Judge says at the end of paragraph 7 of his judgment:

1. (1884) I.L.R. 8 Mad. 175.
2. (1917) 32 M.L.J. 392.
3. (1931) 62 M.L.J. 107.
4. (1935) 69 M.L.J. 98.
5. A.I.R. 1939 Pat. 89.
6. (1860) 5 H. & N. 371 : 27 L.J. Ex. 193.
7. A.I.R. 1917 Pat. 43.

"The whole story of payment of money, of the execution of the lease deed, and of retention of the lease deed by the plaintiffs, appears to be totally improbable and unnatural."

The Subordinate Judge uses stronger expressions. To quote only a few sentences from his judgment :

"To my mind these entries were inserted to suit the purpose of the defendant."

"His case was therefore inherently and basically false and he had full knowledge of it."

"As the plaintiffs took out delivery proceedings, he evidently wanted to coerce them into submission by taking out a search warrant."

The only ground given by the learned District Judge to reduce the damages ceases to be a valid ground for such reduction. I quite agree that, if it was a mere question of amount, the High Court would not lightly interfere with it in second appeal. But where the amount is substantially reduced by the District Court, on a wrong view, the error must be set right. I have already referred to the decision in *Venkatappayya* v. *Ramakrishnamma*[1], where the amount awarded by the Subordinate Judge was increased from Rs. 500 to Rs. 1,500. The malice of the defendant comes into play only for assessing the mental pain or anguish caused to the plaintiffs, one of whom is a *purdhanashin* lady and whose house was searched. There are no materials before us on which any definite assessment could be made in money of this solatium that a Court is entitled to award in actions of this kind by way of exemplary damages. While the plaintiffs say that even the Rs. 2,000 granted by the Subordinate Judge falls far short of the claim in the plaint which was for Rs. 3,600 out of which Rs. 3,100 was claimed for the search, the complaint on the other side is that it is far too excessive. This is one of those cases where the Courts have to take an arbitrary view and arrive at some rough and ready figure as to what would meet the requirements of the case. I fix the damages at Rs. 1,200. I direct that the first defendant do pay the plaintiffs the costs right through. The decree will be modified accordingly.

The memorandum of cross objections is dismissed without any costs.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Seeyali Veettil Abubacker .. *Appellant**

v.

Ovinakath Vayyilapurayil Mariyumma .. *Respondent.*

Guardians and Wards Act (VIII of 1890), section 25—Lawful Guardian's right to custody of children—Limits—Welfare of minors of primary importance.

Though a father, the guardian of his children under his personal law, is entitled to apply for an order under section 25 of the Guardians and Wards Act requiring the mother of the children to return them to his custody, the fact that he is their lawful guardian does not mean that the Court is compelled to pass an order in his favour under section 25. According to the section the Court may make an order for their return if it would be for the welfare of the children. The welfare of the minors is of primary importance.

Where the applicant for the custody of his children had divorced the mother of the children and had married another wife and had not even cared to visit his children staying with their mother and had not scrupled to make allegations against the character of the mother of the children which he was unable to prove,

Held, that the applicant was not a proper person to have the custody of the children and that it was not in the interests of the children that they should be directed to be restored to his custody.

Appeal against the order of the District Court, North Malabar, dated 10th March, 1944, in O. P. No. 41 of 1943.

B. Pocker for Appellant.

N. R. Sesha Aiyar for Respondent.

The Judgment of the Court was delivered by

---

1. (1931) 62 M.L.J. 107.

* A. A. O. No. 341 of 1944. 30th August, 1945.

The Chief Justice.—The appellant who is a Muhammadan, applied in the Court of the District Judge of North Malabar for an order appointing him the guardian of his children by the respondent. Subsequently he amended his petition and asked for an order of the Court requiring the respondent to return the children to his custody. The District Judge dismissed the petition. Hence the appeal.

The appellant has been married three times. The respondent was his second wife. By his first wife he had a son. He divorced her and the son is in the custody of his mother. By the respondent he has three children, two boys and a girl. The eldest child is nine years of age and the youngest five years of age. The appellant married his third wife before he divorced the respondent. He is now living with the third wife in the house of her tarwad. The respondent is living in her own tarwad house with her mother. Her children are living with her. The respondent has remarried.

Being the lawful guardian the appellant did not require an order of the Court to support his right to act as the guardian. In fact an application under the Guardians and Wards Act for an order appointing him guardian did not lie. See *Sivasankara Mudaliar* v. *Radhabai Ammal*[1]. Being the guardian of his children under his personal law he was, of course, entitled to apply for an order under section 25 of the Guardians and Wards Act, but the fact that he is their lawful guardian does not mean that the Court is compelled to pass an order in his favour under section 25. When the appellant divorced the respondent she took her children with her, which amounted to removing them from the custody of their father. The section does not require the Court to make an order for their return. It says that the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian, may make an order for his return. The welfare of the minor is of primary importance.

The District Judge after reviewing the facts came to the conclusion that it was not in the interest of the minors that an order should be passed directing the respondent to return them to the custody of the appellant. We consider that the District Judge is quite right when he says that the children are likely to be better looked after in the respondent's tarwad house than in the house of the appellant's third wife. If they were returned to their father, they would have to live amongst strangers. There is evidence that the appellant's business requires his frequent absence. We have also to take into consideration the fact that the appellant after he had divorced the respondent did not visit his children or have them with him. Then there is the fact that in his petition he made allegations against the respondent's character. We consider that these allegations were made in order to bolster up his claim to the return of the children. They have certainly not been proved. The fact that they were made and not proved is in itself an indication that the father is not a proper person to have the custody of his children. There is a further factor. The application which has given rise to this appeal was not filed until after the respondent had written through a lawyer demanding further money for the maintenance of the children.

We see no reason for disagreeing with the District Judge and we dismiss the appeal with costs.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Chakkiat Gopalan .. *Appellant**

v.

P. K. Sankaranarayana Iyer and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), section 17, clause (c)—Scope—Exemption from kanamdar's *right to renewal of "dry lands" covered by the* kanam*—Is to be determined on the state of the lands at the date of application for renewal and not at date of the* kanam*—Section 3, clause (d)—" Dry land "—Test for deciding.*

1. (1939) 2 M.L.J. 515.

* A. A. A. O. No. 61 of 1944. 17th September, 1945.

Under section 17 clause (*c*) of the Malabar Tenancy Act which provides that where all the lands covered by a *kanam* are dry lands the *kanamdar* is not entitled to a renewal, the question is to be determined on the state of the lands at the date of the application for renewal and not at the date of the *kanam*.

Though paddy may not be actually cultivated on the relevant date, if the land was adapted for the cultivation of paddy the land would be a wet land as defined in the Act. If it is not so adapted it would be "dry land."

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 14th October, 1943, and made in A. S. No. 88 of 1943 (A. S. No. 37 of 1943, District Court) preferred against the order of the Court of the District Munsiff of Calicut dated 13th November, 1942, in O. P. No. 156 of 1941—O. S. No. 172 of 1940.

K. Kuttikrishna Menon for Appellant.

P. Govinda Menon and *C. K. Viswanatha Aiyar* for 3rd Respondent.

The Court delivered the following

JUDGMENT.—This second appeal raises an interesting question whether under section 17, clause (*c*) of the Malabar Tenancy Act XIV of 1930, which provides that where all the lands covered by a kanam are dry lands, the kanamdar is not entitled to a renewal, the question is to be determined on the state of the lands at the date of the application for renewal or at the date of the kanam. In this case the kanam in question was executed on the 2nd December, 1921. The jenmi filed O. S. No. 172 of 1940 for redemption of the kanam and for recovery of possession from the kanamdar. Thereupon the defendant kanamdar filed an application under section 22 of the Malabar Tenancy Act to compel the jenmi to execute a renewal of the kanam. Under section 22, clause (1), a kanamdar is entitled to apply to the Court for the execution of a renewal deed and this notwithstanding any contract to the contrary whether made before or after the commencement of the Act. We must now turn to section 17 which enacts when the kanamdar is entitled to a renewal. Clause (*a*) of that section says—

"A kanamdar shall on the expiry of the kanam under which he holds be entitled to claim and his immediate landlord shall be bound to grant a renewal, enuring for a period of twelve years of the same on payment, as renewal fee, * * *."

Clause (*c*) says this :

"Nothing in this section shall apply to a kanam—

(i) Where the kanartham exceeds—

in South Malabar, sixty per cent., and

in North Malabar, forty per cent.,

of the value of the jenmi's rights in the holding, or

(ii) where all the lands covered by the kanam are dry lands."

Two objections were put forward by the jenmi ; first that the kanartham or the amount of the kanam exceeds 60 per cent. of the value of the jenmi's rights in the holding and secondly that all the lands covered by the kanam are dry lands. Both the lower Courts held against the kanamdar. No finding was given whether the kanartham or the amount secured by the kanam exceeded 60 per cent. of the value of the jenmi's rights in the holding. Both the Courts held however that no portion of the lands was at the date of the suit cultivated with paddy and that therefore all the lands covered by the kanam are dry lands.

The expression " dry lands " is defined in section 3, clause (*d*), as meaning a land which is neither a 'wet land ' nor a ' garden land '. ' Garden land ' is defined in clause (*g*) as meaning any land used principally for growing fruit-bearing trees. Clause (*x*) defines a wet land as meaning a land which is adapted for the cultivation of paddy. When the second appeal came on before me on a former occasion, it was urged that the expression " wet land " includes not merely lands on which paddy was being grown but also lands which are adapted for the cultivation of paddy. It was said that there was no finding by the lower Courts whether the land was adapted for cultivation of paddy. I called for findings on the two questions, whether any portion of the lands demised under the kanam are wet

lands and whether the kanartham exceeds 60 per cent. of the value of the jenmi's rights. The lower appellate Court has now returned findings. The findings are that the kanam amount does not exceed 60 per cent. of the value of the jenmi's rights in the holding and that all the lands are dry lands. The finding on the first question is one of fact and no reasons have been shown why I should not accept the finding.

Arguments centered on the second question, namely, whether the lands are dry lands within the meaning of section 17, clause (*c*) (*ii*). The kanam deed under which the suit lands were demised is evidenced by Ex. P-1 which shows that at that time the lands were at least capable of paddy cultivation. The lands must therefore be taken to have been wet lands at the time of the kanam. The finding is that on the date of the suit and at the time of the application for renewal the lands are all dry lands. Mr. Kuttikrishna Menon, the learned advocate for the appellant, argues that the question is to be determined by the state of the lands at the date of the kanam and not at the time of the suit.

Various considerations were put forward by the learned advocates in support of the respective contentions. Section 17 begins by saying that a kanamdar shall on the expiry of the kanam be entitled to claim a renewal and clause (*c*) says that nothing in the section shall apply to a kanam where all the lands covered by the kanam are dry lands. Reading the two together, it looks to me that the expression "where all the lands covered by the kanam are dry lands" refers to the point of time when the kanamdar expresses his desire to get the renewal. Mr. Kuttikrishna Menon, argues that if a jenmi or a landlord created a kanam of lands which were all dry at that time, he ought not to be prejudiced by anything done by the kanamdar after the date of the kanam and that if the other argument is accepted, a kanamdar can easily defeat the right of the jenmi by converting a very small portion of the holding into wet lands. On the other side it is said that conversion of dry land into wet is a normal feature in the west coast and the argument of the appellant would result in preventing free conversion of dry lands into wet which it is said would be undertaken by a kanamdar only if he is assured of a fixity of tenure or a right of renewal. There may be much to be said for either view but the question ultimately depends upon the wording of the Act. Mr. Kuttikrishna Menon draws my attention to section 17, explanation II which says this :

"For the purpose of sub-section (*c*) the jenmi's rights in the holding shall be valued at twenty times the excess of the annual fair rent of the holding over the annual revenue payable thereon to Government—

(1) in the case of a kanam existing on the date of the commencement of this Act, on such date, and

(2) in the case of a kanam created after the commencement of this Act, on the date of the kanam."

He therefore urges that for the purpose of determining the question under clause (*c*) (1) whether the kanartham exceeds 60 per cent. in South Malabar and 40 per cent. in North Malabar, the relevant date is the commencement of the Act in cases of old kanams and the date of the kanam deed in the cases of future kanams. If the language of the Legislature is clear, then other considerations do not arise. In explanation II to section 17, the Legislature expressly says that future kanams are governed by the state of things as they stand on the date of the creation of the kanams. Sections 33 and 34 provide that the amount payable by the tenant to purchase the landlord's right in the kudiyiruppu is to be determined by the value on the date of the acceptance by the landlord of the tenant's offer.

There again the language is clear. Though the question is not quite free from difficulty, I hold the expression where the land covered by the kanam are dry lands read with section 17 (*a*) that a "kanamdar shall on the expiry of the kanam under which he holds be entitled to claim a renewal,", indicates that the relevant point of time is the time when the kanamdar claims the renewal and not the date of the original kanam.

The next point raised is whether all the lands included in the holding are in fact dry lands. The finding is that they are all dry lands and this finding is vehe-

mently attacked, but I see no reason to differ from the finding of the lower Court on this point. First, it was sought to be argued that the land was garden land. My attention was drawn to the evidence of the tenant examined as D.W. 1 that there are 300 cocoanut trees on the suit property but we have the report of the commissioner which shows that there are only very few trees. The commissioner says :

"The suit properties, in respect of which renewal is sought, comprise four items, $2\frac{3}{4}$ acres in extent, situated in a crowded middle class residential quarter within the municipality (Calicut) between the 4th and 5th railway gates. There are 31 buildings in all in the properties. They are of all kinds and sizes and types ranging from small cadjan huts to commodious modern type bungalows, very close to one another, in fact some a few feet from one another. The major portion of the properties has been built upon and *the few cocoanut and other trees* occupy only a small portion, compared to the whole. All the buildings belong to the sub-tenants and almost all are occupied by the owners themselves. All the four items are mainly used for residence by the occupants and not for growing fruit bearing trees."—

The italics are mine.

As now held by this Court in *Kunhamad Koya* v. *Gopala Menon*[1], a plot which is principally used as a residential house cannot by reason of the fact that there are a few cocoanut trees or other fruit bearing trees be said to be " land used principally for growing fruit trees," which is the definition of a garden land. As 120 trees per acre is the maximum number of cocoanut trees planted in an acre even according to Mr. Kuttikrishna Menon, 330 will be the maximum that can be planted in $2\frac{3}{4}$ acres which is the extent of the whole land. If there are really 300 cocoanut trees as D. W. 1 deposes there would be no room for any buildings at all. The fact that there are 31 buildings some of which are modern type commodious bungalows shows that the defendant's evidence is obviously false. The commissioner's report shows that there are only a few trees. I therefore agree with the lower Court in its finding that the land is not a garden land.

Then the next question is whether the whole or any part of the suit land is a wet land. The appellant attempted to prove that a portion of the land was actually cultivated with paddy crops for some years before the suit. But this evidence was not accepted by the lower Courts on the former occasion and the Subordinate Judge who has returned the finding has also rejected that evidence and that is a finding of fact which is binding upon the appellant.

The further point is that whether any of them is adapted for paddy cultivation. As pointed out by me in the order calling for findings, the definition of a wet land is " land which is adapted for the cultivation of paddy." I pointed out that though paddy may not be actually cultivated on the relevant date, if the land was adapted for the cultivation of paddy, the land would be a wet land as defined under the Act. The fight centred very severely on this question whether any portion of the suit land was at the relevant date adapted for cultivation of paddy. The Subordinate Judge deals with this question in paragraphs 6 to 13. As he points out there are four items included in the suit lands and all the four appear now as one block and are situated in a somewhat thickly populated area in Calicut municipality. As regards item 1 dealt with in paragraph 7 of the finding, it contains a big house with a tiled cow shed attached to it with only a few cocoanut trees and the Subordinate Judge says :

"Practically the whole of the property is taken up by the house and trees standing around them and there is no vacant space worth mentioning left."

Therefore no part of this item can be cultivated with paddy.

Item 2 is described in paragraph 8 of the finding as a comparatively narrow strip of land with three houses and cocoanut trees round the houses. The Subordinate Judge points out that there is practically no vacant space between the houses and the trees. The finding that item 2 is a dry land must also be accepted.

---

1. (1942) 2 M.L.J. 744.

Item 4 : Dealing with item 4 the Subordinate Judge points out that this item also is almost fully built upon leaving no vacant space for the purpose of paddy cultivation. Two small plots were pointed out by the appellant in this item as being fit for paddy cultivation. The lower Court has found that these two plots are really unfit for paddy cultivation. I accept the finding.

Item 3 : The fight centred mainly on item 3 dealt with in paragraphs 10, 11 and 12 of the finding. The Subordinate Judge says this :

"The appellant mainly concentrated upon item 3 and his contention is that portions of this item are wet lands and that he was cultivating them."

As regards one portion the commissioner reported that the appellant had no case before him that that portion was a wet land. As regards the rest of the land, the commissioner says that deducting the space occupied by the road, houses, cocoanut trees and raised *natas* or bunds, there were only two vacant spaces worth mentioning, one measuring 62 feet X 55 feet and the other measuring 75 feet X 96 feet. The commissioner reported that the level and the situation of the two plots indicated that they were not suitable for wet cultivation. He says :

"with trees and buildings on all the four sides in close proximity as they do now exist, I do not think that it is possible for one to attempt even at such a small scale paddy cultivation in such a small extent as this. Even if in a small corner like this, removal of mud is attempted, the chances are that there will be an excess collection of water coming into it from all the four sides with no chances of the same being conveniently let out. Especially if the northern section is deepened to the extent mentioned above, the chances are that the water from the thodu will rush into the plot and will remain stagnant thereby rendering the same unfit for any paddy cultivation."

The Subordinate Judge accepted the commissioner's report and the other evidence and finds that the land is not fit for paddy cultivation.

The Subordinate Judge's finding on point 2 is expressed thus in paragraph 16 :

"On point 2 I find that the suit lands are all dry lands at present and that no portion of the suit land is at present a wet land as defined in section 3 (*x*)."

The proper standard of proof has been applied by the Subordinate Judge. The question is really one of fact and I see no reason to differ from the finding of the Subordinate Judge. It is unnecessary to go into the other questions.

The result is, the appeal fails and it is dismissed with costs.

No leave.

K.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Kalianna Goundan .. *Appellant**

v.

Settia Goundan and others .. *Respondents.*

Public Policy—Agreement to compound offences—Complaint disclosing noncompoundable offences—Sworn statement disclosing only compoundable offences and summons issued only for those offences—Agreement to compound such offences—Validity.

The object of a sworn statement is to see whether there is any justification for taking action in respect of all offences disclosed in the complaint as complaints are often exaggerated.

Where the complaint disclosed noncompoundable offences under sections 147 and 148 of the Indian Penal Code, but the sworn statements disclosed only compoundable offences under sections 447 and 426 of the Indian Penal Code and summonses were issued only for those offences and there was an agreement between the parties to compound those offences,

Held, that the validity of the agreement could not be impugned as the parties were at perfect liberty to compound compoundable offences. The real object of the agreement was not to stifle noncompoundable offences.

Appeal against the decree of the District Court of Salem in A. S. No. 348 of 1943, preferred against the decree of the Court of the District Munsiff, Sankaridrug at Salem in O. S. No. 538 of 1940.

K. V. Ramachandra Aiyar and *T. N. Sundaresa Aiyar* for Appellant.

D. Ramaswami Aiyangar for Respondents.

* S. A. No. 1924 of 1944. 27th July, 1945.

The Court delivered the following

JUDGMENT.—The lower appellate Court was clearly in error in thinking that the object of the agreement was to stifle non-compoundable offences. The complaint that was made by the defendant is Ex. P-2. He gave a sworn statement which was recorded by the Magistrate on the 2nd August, 1940. Though he implicated as many as six persons as the accused in the complaint, when examined by the Magistrate he attributed specific acts only to four persons. He said that Pavayammal and Athayammal, accused 4 and 5, prevented him from baling out water by holding the rope and unyoking and driving away the bulls. Then he said that Kaliyanna Goundan and Marappa Goundan, accused 1 and 3, removed the baling stand and threw it into the well. No doubt in between these two statements there is another statement that the first three accused removed the baling stand and threw it into the well. That apparently was a general statement which did not satisfy the Magistrate. So he appears to have asked the complainant who it was that actually removed the baling stand and threw it into the well. Then the complainant said that it was the first and third accused. No other acts are attributed either to the second or sixth accused. Seeing that specific acts were attributed only to accused 1, 3, 4 and 5, the Sub-Magistrate was justified in taking the complaint on file under sections 447 and 426 of the Indian Penal Code. These two offences are admittedly compoundable offences. Summonses were issued to the accused only of offences under these two sections and that was all that they were called upon to meet. Hence even if the real object of the agreement, which is now in suit, was to compound the offences in respect of which summonses were issued to the accused, the validity of the agreement cannot be impugned. The parties were at perfect liberty to compound compoundable offences. The learned District Judge is not justified in stating that there was really a complaint of rioting and unlawful assembly under sections 147 and 148 of the Indian Penal Code and that the object of the agreement was to stifle those offences. Complaints are often exaggerated and the object of a sworn statement is to see whether there is any justification for taking action in respect of all the offences disclosed by the complaint. If in the sworn statement only minor offences are disclosed the Magistrate is perfectly justified in taking action only as regards the offences disclosed in the sworn statement. This is what was done in this case. The District Judge seems to have been carried away by the fact that the agreement in question was entered into in the presence of the Sub-Inspector. His remarks against the Sub-Magistrate are entirely unjustified. I find that the real object of the suit agreement was not to stifle non-compoundable offences.

The result is that the decree of the lower appellate Court is reversed and that of the trial Court is restored. I make no order as to costs here or in the lower appellate Court.

No leave.

V.P.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Rajah Saheb Moharbon Dostan Sri Raja Rao Venkata Kumara Mahipathi Surya Rao Bahadur Garu, Maharajah of Pithapuram. *Appellant**

v.

Kunjam Konayya and others .. *Respondents.*

Madras Estates Land Act (I of 1908), sections 163 and 77—Sale for arrears of rent—Amount accruing between dates of sale and delivery of holding—If could be recovered as rent.

A landholder brought three plots of property to sale for arrears of rent due to him and purchased them. In a suit for recovery of arrears of rent for subsequent faslis, on the question whether the landholder was entitled to recover the sum as rent for the period between the dates of sale and dates of delivery of possession,

* S. A. No. 470 of 1945. 11th September, 1945.

Held, that by reason of the provisions of section 163, Madras Estates Land Act, he was entitled to recover an amount equal to rent in respect of the plots from the persons in occupation in a suit under section 77 of the Madras Estates Land Act because such an amount could under section 163 be recovered as if the amount was an arrear of rent.

Mangamma v. *Maharajah of Pithapuram*, (1944) 1 M.L.J. 205, followed.

Appeal against the decree of the District Court, West Godavari, at Ellore, in A. S. No. 254 of 1944, preferred against the decree of the Court of the Deputy Collector, Kovvur, in S. S. No. 267 of 1942.

Ch. Raghava Rao for Appellant.

P. Somasundaram for Respondents.

The Court delivered the following

JUDGMENT.—Three out of four plots comprised in a holding were purchased by the appellant (plaintiff) in sales for recovery of arrears of rent due to him as the landholder. He brought a suit for recovery of arrears of rent for subsequent faslis 1349, 1350 and 1351 against the first defendant who was the registered pattadar, and against the second defendant as the person in actual occupation. The first defendant died when the matter was in appeal in the District Court and respondents 3 to 7 in the lower appellate Court were brought on record as his legal representatives. The Deputy Collector decreed the suits except in regard to the period between the dates of the sales in which the appellant himself had become the purchaser of the three plots and the dates on which he took delivery of them. He also directed, in view of the fact that the first defendant was not the actual enjoyer of the suit land, that the suit holding should be proceeded against in the first instance and the first defendant personally, last. The plaintiff appealed, but the learned District Judge dismissed this appeal.

In second appeal Mr. Raghava Rao for the appellant urged two points. The first is that the lower Courts erred in disallowing the rent for the period between the dates of sale and the dates of delivery. The lower Courts apparently were of the opinion that after the rent sales, the defendants could not be considered to be ryots and the sum due to the landholder from them will not amount to rent and therefore could not be the subject-matter of a suit under section 77 of the Madras Estates Land Act. No doubt in a sense this may be true and after the sales, the persons in occupation would be technically trespassers. Nevertheless, by reason of the provisions of section 163 of the Act, the landholder will be entitled to recover an amount equal to the rent in respect of the plots from the persons in occupation in a suit under section 77 because such an amount could under section 163 be recovered as if the amount was an arrear of rent. The decision of King, J., in *Mangamma* v. *Maharajah of Pithapuram*[1] is direct authority for this position. The District Judge was wrong therefore in disallowing the plaintiff's claim in respect of this period.

The second point urged for the appellant was that the first defendant and his legal representatives should have been made primarily liable because the first defendant was the registered pattadar. But it follows from what I have said before, that the relationship between the first defendant and the plaintiff-appellant ceased to be the relationship between a ryot and a landholder from the date of the rent sales. Thereafter the first defendant had no legal status as a ryot, nor therefore any legal liability as a ryot. It was not apparently disputed in any seriousness that the actual enjoyer was the second defendant. The trial Court definitely found so and the District Judge has not disagreed with that finding. The plaintiff would therefore be entitled to recover the amount due to him as rent for the period subsequent to the rent sales from the holding and the second defendant.

The second appeal is dismissed with costs as against the contesting respondents and will be allowed with costs throughout, as against the first respondent (2nd

1. (1944) 1 M.L.J. 205.

defendant). The trial Court will determine the rent payable in respect of the three plots in suit and pass a decree for the amount found due against the second defendant.

K.C. — *Appeal allowed as against one respondent and dismissed as against the rest.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Mekkileri Koppirichi (since deceased) and another .. *Appellants**

v.

Uppoonni Thattari Kunhi Ramar .. *Respondent.*

Malabar Tenancy Act (XIV of 1930), *section* 33—*Marupat in respect of paramba and farm house—Assignment of lease—Enjoyment of house site for over ten years—Right under section* 33 *to purchase right of landlord—Fact that house was put up recently, whether material.*

The suit was to recover possession of the property covered by a *marupat* and arrears of rent subject to a payment of the value of the improvements that may be found to be due to the defendants, who were assignees of the right from the original lessee. The *marupat* which was granted in 1929 comprised besides a paramba, a farm house which belonged to the landlord. The tenants were permitted to reside therein and separate rent was also specified for the occupation of the house. The assignment in favour of the defendants was executed in 1935. In 1941 the landlord permitted the tenant to pull down the house then in existence and received a certain sum as its value. He allowed the tenant further to construct a new house at his own expense and agreed to give him the value of the new house at the time of the surrender of possession of the paramba. A new house was accordingly built in pursuance of this permission. The defendants claimed that they were entitled to purchase the site on which the house stood and the approach to it in terms of section 33 of the Malabar Tenancy Act.

Held that as the tenant and the defendants, who were found to be members of the family of the lessee, had been in continuous occupation of the house site for the requisite period of ten years they were entitled to the benefit of section 33 of the Malabar Tenancy Act, and that the fact that the house was in fact put up only in 1941 did not affect their right.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in A. S. No. 232 of 1943, preferred against the decree of the Court of the District Munsiff, Tellicherry, in O. S. No. 399 of 1942, etc.

P. Govinda Menon for Appellants.

K. Kuttikrishna Menon for Respondent.

The Court delivered the following

JUDGMENT.—The question of law which arises in this appeal is not free from difficulty. The facts which are not in dispute are as follows: On 1st October, 1929, one Chandu executed a marupat, Ex. P-2 in favour of one Chandu Panikkar. The rights of the lessor, Chandu Panikkar, are now vested in the plaintiff. Defendants 1 and 2 are the assignees of the rights of the lessee, Chandu, under a document dated 21st October, 1935. The suit was to recover possession of the property covered by the marupat and arrears of rent subject to a payment of the value of improvements that may be found due to the defendants. The marupat comprised besides a paramba, a farm house which belonged to the landlord. The tenants were permitted to reside therein and a separate rent was also specified for the occupation of the house. Subsequently on 4th March, 1941, the landlord permitted the tenant to pull down the house then in existence and received a sum of Rs. 25 from the tenant as its value. He allowed the tenant further to construct a new house at his own expense and agreed to give him the value of the new house at the time of the surrender of possession of the paramba (*vide* Ex. D-3). A new house was accordingly built in pursuance of this permission.

The dispute now is only regarding the site occupied by the house and the approach to it. The defendants claim that they are entitled to purchase the site on which the house stands and the site used as a way leading to the house, under section 33 of the Malabar Tenancy Act. Besides raising this plea in the written

* S. A. No. 1000 of 1944 and A. A. A. O. No. 159 of 1944. 17th September, 1945.

statement, the defendants also filed a petition under section 18, clause (1) and section 33 of the Malabar Tenancy Act offering to purchase the sites (kudiyiruppu).

Section 33 of the Malabar Tenancy Act runs thus :

"In any suit for eviction relating wholly or in part to a kudiyiruppu, which has been in the continuous occupation of a tenant or the members of his family for ten years on the date of the institution of the said suit, such tenant shall be entitled to offer to purchase the rights in the kudiyiruppu, of the landlord who seeks to evict him, at the market price on the said date."

The District Munsiff of Tellicherry held that the defendants were entitled to the benefit of the section. He held that as the defendants were members of the family of Chandu, the original tenant, the period of Chandu's occupation could be added to the period of the occupation by the defendants, in which case the condition in section 33, namely, "the continuous occupation of a tenant or the members of his family for ten years" would be satisfied. He overruled a contention of the plaintiff that the tenants were not entitled to the benefit of the section because of section 2, clause (3). The plaintiff appealed and the Subordinate Judge of Tellicherry allowed the appeals (there were two appeals, one against the decree in the suit and the other against the order on the application). The defendants have filed S.A. No. 1000 of 1944 and C.M.S.A. No. 159 of 1944 against his decision in the two appeals respectively.

The contention of the plaintiff based on section 2 (3) may be first disposed of. Section 2, clause (3) says :

"Nothing in this Act shall apply to—

(3) any building owned by a landlord including a house, shop or warehouse, and the site thereof, together with the garden or land appurtenant thereto."

The house now in existence was built by the tenants at their own expense and cannot obviously be described as a building owned by the landlord. This fact is sufficient to preclude the plaintiff-landlord from relying on the provision. It cannot, therefore, be said that the Act does not apply to this case.

Mr. Govinda Menon for the appellants contended that the appellants have satisfied the conditions mentioned in section 33 of the Act and are entitled to the benefit of it because they and the members of their family have been found to be in continuous possession of the kudiyiruppu on which the present house stands for over ten years. Mr. Kuttikrishana Menon for the landlord-respondent, however, urges that till 1941, the house on the site admittedly belonged to the landlord and the period of occupation subsequent to 1941 falls far short of the period of ten years requisite under the section as the suit was filed on 17th July, 1942. This contention of the plaintiff also found favour with the Subordinate Judge who says as follows :

"Since the house became the tenant's house only on the 4th March, 1941, the tenant has not completed the period prescribed in section 33 of the Malabar Tenancy Act to entitle him to purchase the kudiyiruppu."

Kudiyiruppu is defined as follows in the Act :

"'kudiyiruppu' means and includes the site of any residential building, the site or sites of other buildings appurtenant thereto, such other lands as are necessary for the convenient enjoyment of such residential building, and the easement attached thereto."

Applying this definition and attaching the ordinary meaning to the words in section 33, it cannot be denied that the tenants have been in the continuous occupation of the kudiyiruppu, that is, the site of a residential building and the pathway necessary for the convenient enjoyment of the building. In this view the tenants in this case would certainly be entitled to the benefit of section 33.

It is, however, possible to construe the section to mean that the occupation contemplated by the section is occupation in respect of a house belonging to the tenant, in which case alone, it would be accurate to speak of occupation of the kudiyiruppu and to exclude the application of the section to the occupation of a tenant of a house belonging to the landlord, which no doubt may also mean an occupation of the site on which the house stands. The object of the section may be said to be that if a tenant has built a house or is in occupation of a house belonging to him which is situated on a site belonging to the landlord for a number of years,

it would be hard on the tenant to be evicted therefrom when the landlord could be adequately compensated by being awarded the value of the site. In the present case the facts are that it is only in 1941 that the tenant can be said to have put up their own house on a site belonging to the landlord, and the tenants have been occupying that house only for a period of 16 months by the date of the institution of this suit.

Though I find it more equitable to construe section 33 in this manner, I feel that it is not permissible for me to disregard the plain language of the section. The present suit is for eviction and relates in part to a kudiyiruppu, that is, the site of a residential building. This site has been in the continuous occupation of the tenant and members of his family for over ten years on the date of the institution of the suit. The tenants that is the defendants (appellants), therefore, will be entitled to offer to purchase the rights in the kudiyiruppu of the landlord who seeks to evict them. The appeals are therefore allowed, the decree and the order of the Subordinate Judge set aside and the decree and order of the District Munsiff are restored. The petitioners (appellants) will get their costs from the respondent throughout—Advocate's fee in the second appeal.

B.V.V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Duggempudi Ramakrishna Reddi, minor, by next friend and maternal grandfather Gadey Peda Venkata Reddy .. *Appellant**

v.

Duggempudi Veerareddi and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 23, rule 1—Plaintiff called upon to pay additional court-fee in respect of an item of property—Right to abandon that part of claim and to give up a particular defendant in order to avoid paying the additional court-fee—Formal application for amendment of plaint—Not essential—Dismissal of entire suit for non-payment of deficit court-fee when plaintiff abandons part of his claim—Legality.

A plaintiff has always a right to abandon a part of his claim and for abandonment it is not necessary to file an application for an amendment of the plaint. If he abandons part of his claim he has only to intimate the fact to the Court and the Court has only to note it on the plaint.

Where a plaintiff on being called upon to pay an additional court-fee and after taking time for payment does not pay that court-fee but files a memorandum giving up one defendant and the item of property in respect of which the additional court-fee was ordered to be paid and says that he would go on with the suit as regards the other items as to which there was no trouble about the valuation, he is entitled to do so. It is not essential that an application for amendment must first be made before the plaint can be treated as restricted to the other defendants and the other properties. In such a case the entire suit cannot be dismissed for non-payment of the deficit court-fees. Case-law discussed.

Second appeal against the decree of the District Court, Guntur, in A.S. No. 126 of 1944 preferred against the decree of the Court of the Subordinate Judge, Guntur, in O.S. No. 31 of 1943.

P. Chandra Reddi and *K. Venkataratnam* for Appellant.

P. Suryanarayana (*amicus curiæ*) for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit for partition filed by the appellant claiming a third share in the family properties. The suit was at first filed against two defendants, first defendant being the father and the second defendant being the brother of the plaintiff. The third defendant was later on added on the ground that that he was an alienee of item 6 of the plaint properties from the father, the first defendant. The Subordinate Judge then raised an additional issue whether the plaintiff can claim any relief in respect of item 6 of A schedule without having the sale set aside and whether the court-fee paid is correct. He held that the sale ought to be set aside and that court-fee should be paid on the value of item 6. This item was valued in the plaint at Rs. 1,012 and therefore

* S. A. No. 471 of 1945. 6th September, 1945.

the Subordinate Judge called upon the plaintiff to pay an additional court-fee of Rs. 119-15-0. Time was given till the 23rd December, 1943, for payment. Plaintiff took time for payment till the 30th December. The Subordinate Judge did not attend Court on that day and the case was posted to the 10th January, 1944. On that day instead of paying the deficit court-fee, the plaintiff filed a memorandum giving up the third defendant and the sixth item of the A schedule property and said that he would go on with the suit as regards the other items which were admittedly in the possession of defendants 1 and 2 and as to which there was no trouble about the valuation. The Subordinate Judge held that the plaintiff was not entitled to relinquish any portion of his claim without filing a petition for amendment of the plaint and that as no such petition was filed he had under Order 7, rule 11, Civil Procedure Code, no option but to reject the plaint. He therefore dismissed the entire suit. On appeal the District Judge has confirmed the decree of the trial Court agreeing that:

> "When the withdrawal of a part of the claim is not accompanied by a petition to amend the plaint, the plaint remains at large as a document on which the required court-fee has still to be paid."

The District Judge recognised that under Order 23, rule 1, the plaintiff may at any stage withdraw his suit or abandon part of his claim and that he can do so without the leave of the Court, but he held agreeing with the trial Court that until the plaint is amended by a petition filed for that purpose, the plaint remains at large as a document on which the required court-fee has still to be paid and that Order 7, rule 11 compels the Court to reject the entire plaint. I am unable to agree. Under Order 23, rule 1, Civil Procedure Code:

> "At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim."

No permission of the Court is necessary for this purpose. He has only to intimate to the Court that he withdraws the suit against all or any of the defendants or that he abandons a part of his claim. The plaintiff intimated to the Court that he withdrew the suit against the third defendant and that he abandoned his claim to item 6 of the plaint A schedule. It is difficult to see what else is necessary to take item 6 and the third defendant out of the plaint. It is too much of a technicality to say that it must be in the form of an application for amendment of the plaint. No authority has been cited in the judgments of either of the lower Courts in support of the position that an application for amendment must first be made before the plaint can be treated as restricted to the other defendants and the other properties. The trial Judge relied upon the decision in *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[1], in support of his conclusion. There the plaint was rejected by the trial Court when after being required to supply the deficit court-fee, the plaintiff failed to do so. An appeal was taken to the High Court and it was first urged that the valuation as given in the plaint was correct and that no further court-fee could be demanded. The Judges seem to have expressed the opinion during the course of the arguments that the position taken up was untenable. Then in the course of the arguments the appellant's counsel prayed for permission to have a particular prayer struck off and for restoration of the suit. It is in respect of that prayer that additional court-fee was required. The learned Judges first dealt with the question whether the plaint as it stood required the additional court-fee and they decided that it did. Then they dealt with the request made by the appellant's counsel to strike off the particular prayer which led to the trouble. They pointed out that at the stage when the matter came before them, there was no longer any plaint and that it had already been dismissed by the trial Court. It is under those circumstances that the learned Judges refused to allow the appellant's request to strike out the particular paragraph. They first pointed out that the trial Judge rightly came to the conclusion that the plaint was written on paper insufficiently stamped and that the plaintiff on being required by the Court to

1. (1916) I.L.R. 44 Cal. 352.

supply the requisite stamp paper within the time fixed by the Court, failed to do so. They pointed out that, therefore, the trial Judge had no other alternative except to reject the plaint, in accordance with the terms of the rule. In fact they said that the trial Judge had no other alternative except to reject the plaint. Then dealing with the request for striking out the prayer at the stage of the appeal, Sanderson, C.J., said this :

> "In my judgment he ought not to be allowed to do so for the reasons I have already given and this Court has no more power than the learned Judge when it is shown that the case comes within Order 7, rule 11. This Court has no jurisdiction, the provision is mandatory, and this Court, just the same as the Court below, is bound by that section which provides that under the above-mentioned circumstances the suit shall be rejected."

These observations no doubt seem to be in favour of the respondents, but the decision must be confined to the facts of the case which were that at the stage when the request was made to the High Court, the plaint had alrady been rejected. This is how this decision has been viewed and applied by the same High Court in *Mt. Saiyadunnessa* v. *Gaibandha Loan Co.*[1] There the trial Court held that a further court-fee ought to be paid and gave some time. On the adjourned date the plaintiff put in a petition to reduce the amount claimed so as to bring the claim within the court-fee paid. The application for amendment was rejected and the plaint also was rejected as being insufficiently stamped. The matter was taken to the High Court and it was held that inasmuch as the plaintiff had applied for amendment of the plaint by reducing the claim for compensation before the expiry of the time given to him for paying the deficit court-fee, or before any order rejecting the plaint was passed, the Court had power to consider the application on merits and allow the abandonment of the claim as prayed for and that the Court cannot be said to have lost this power of allowing amendment by reason of the fact that the plaintiff was allowed time to make good the deficit court-fees. The decision in *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2] was pressed upon their attention. In dealing with that decision the learned Judges said this :

> "The contention for the appellant is that the learned Judge below was wrong in thinking that in the present case he was bound by the decision in *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2] and that what the plaintiffs were asking for by the aforesaid petition of 21st June, 1934, was to abandon a part of their claim, which they are entitled to do at any time after the institution of the suit under Order 23, rule 1, Civil Procedure Code. Mr. Gupta for the respondent-defendant 1, on the other hand, has contended that the decision in *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2] governs the facts of the present case. In that case, a court-fee of Rs. 10 was paid in a suit purporting to be under section 111-A of the Bengal Tenancy Act, but the plaintiffs prayed for the declaration (*a*) that they were occupancy raiyats, and (*b*) that the entry in the Record of Rights, showing them as tenure holders, was a nullity ; the plaintiffs, on being required to supply the deficit court-fee on the second relief claimed, failed to do so within the time fixed by the Court and so the plaint was rejected under Order 7, rule 11, Civil Procedure Code. Thereupon, at the time of the argument before the High Court, the Advocate for the appellants prayed for permission to have that prayer struck off and for restoration of the suit. The judgment of Sanderson, C.J., shows that the Court agreed with the decision of the Judge below and held that he had no alternative but to reject the plaint under Order 7, rule 11. Turning to the suggestion made in the High Court for permission to have the prayer for consequential relief struck off, Sanderson, C.J., remarks as follows . . . . ."

After quoting the passage from the judgment of Sanderson, C. J., already set out, the learned Judge (S. K. Ghose, J.) proceeded thus :

> "It seems to me that this decision takes it for granted that the order of rejection of the plaint had already been made properly under Order 7, rule 11 for failure to pay the court-fees within the time allowed by the Court. That being the case, it was not open to the Court to allow further amendment of the plaint. But in the present case the prayer for amendment was made actually before the order rejecting the plaint was passed and before the time allowed by the Court for payment of the deficit court-fees had expired. The Court undoubtedly had power to allow abandonment of part of the claim on the part of the plaintiff or, if it be treated as an amendment of the pleadings, to order such amendment under Order 6, rule 17. Either of these things could be done at any time after the institution. Surely it cannot be said that the Court had lost that power by reason of the fact that the party had been allowed a certain time within which to file the court-fees. On the facts as mentioned above it seems to us that the present case may be distinguished from those in *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2]."

1. A.I.R. 1937 Cal. 562.
2. (1916) I.L.R. 44 Cal. 352.

In *Mahant Narsidasji* v. *Bai Jamna*[1], a Bench of the Bombay High Court dissented from the view laid down in the *Midnapore Zamindari case*[2]. Dealing with a similar case, after setting out Order 7, rule 11, the learned Judges said this :

"No doubt the rule uses the words 'shall reject' which are mandatory words. But *prima facie* the rule would seem to be mandatory only *rebus sic stantibus*, that is to say when the Court has to deal simply with the position referred to in the rule, and would not preclude an amendment of the plaint which under Order 6, rule 17, may be made at any stage of the proceedings. It might obviously lead to great hardship if a plaintiff were unable to pay the enhanced fees ordered, and if there were no alternative but the rejection of the plaint. The learned Advocate-General suggested that in that case he might apply to continue the suit *in forma pauperis*. But if the rule is to be construed as strictly as the learned counsel contends that would not be a compliance with it. It would be as much an avoidance of payment of the fees as an amendment of the plaint. We were referred to *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2] which does no doubt support the argument which has been put forward. With all deference however to the learned Judges, who decided that case, we think that it takes too technical a view of the rule."

In *Neelachalam* v. *Narasinga Das*[3], Jackson, J., had to deal with a somewhat similar situation. There the Court ordered payment of a further court-fee of Rs. 57-15-0 and returned the plaint for re-presentation with the deficit court-fee. Instead of paying the required court-fee the plaint was re-presented with a court-fee of Rs. 37 relinquishing a part of the claim so as to bring it within the court-fee that he paid, namely, Rs. 37. The question was whether he could do so. He did not apply for amendment of the plaint and did not obtain the permission of the Court to do so. When the plaint was returned he himself reduced the claim so as to bring it within the court-fee of Rs. 37 which he paid. The lower Court rejected the plaint and the matter was brought up before this Court. Jackson, J., said this :

"The view of the learned Judge is that the plaintiff ought not to have amended the plaint without permission ; but it is difficult to see why permission is required. A plaintiff may relinquish any portion of his claim to bring it within the Court's jurisdiction (Order 2, rule 2) and it seems equally open to him to relinquish a portion in order to bring it within a certain court-fees. As the Court returned the plaint to him the plaintiff did it without consulting the Court. If the Court had kept the plaint presumably he would have asked to have the plaint back so as to strike out the portion and there is no reason why the Court should have objected even if it was entitled to object, which seems very doubtful. In *Midnapore Zamindari Co., Ltd.* v. *Secretary of State for India*[2] upon which the learned Judge relies the plaintiff entirely failed to comply with the Court's order under Order 7, rule 11, and then afterwards sought to remedy matters by striking out a plea. As though in this case after the expiry of the allotted time the plaintiff had attempted to get over the difficulty by striking out a portion of his claim. That is entirely a different set of circumstances."

He relied upon a decision of the Allahabad High Court in *Ram Prasad* v. *Bhiman*[4]. This decision is also to the effect that under similar circumstances the plaintiff may abandon a portion of the claim without running the risk of the suit being dismissed. There the suit was for pre-emption of a sale under which five parcels of property passed. One of these parcels was one quarter of a well. Before the trial Court an objection was raised that the property sought to be pre-empted had been improperly valued, and eventually the well, which for the purpose of pre-emption had been valued at Rs. 100 was held to be worth Rs. 150. Thereupon the Subordinate Judge called upon the plaintiff to pay the deficit court-fee on the extra Rs. 50. This the plaintiffs refused to do, and abandoned their claim to the well. Then the Subordinate Judge dismissed the entire suit. The District Judge on appeal reversed the decree of the Subordinate Judge and remanded the suit. The matter came before the High Court. After stating the facts the learned Judges said this :

"It has been contended that the order of the Munsiff (apparently Subordinate Judge) was right and ought not to have been disturbed. Not without a good deal of hesitation we have come to the conclusion that the order of the District Judge is right. It seems to us that when a plaintiff in the initial stage of the litigation abandons a portion of his claim, he is not compellable to pay court-fees upon that claim under the penalty of having the whole of his suit dismissed. The matter is, we admit, one which is capable of argument on both sides, and it is with some hesitation that we have come to this decision."

---

1. A.I.R. 1939 Bom. 354.
2. (1916) I.L.R. 44 Cal. 352.
3. A.I.R. 1931 Mad. 716.
4. (1904) I.L.R. 27 All. 151.

Though the learned Judges felt some hesitation before coming to the conclusion, Jackson, J., adopted the decision as correct. This position has been reiterated in a decision of the Allahabad High Court in *Sah Ramchand* v. *Pannalal*[1]. The learned Judges said that it was always open to the plaintiff to reduce his claim and effect a saving of the Court-fee. There it was a case of an appeal. The plaintiff appealed valuing his appeal at Rs. 3,203-10-0. The District Judge ruled that the Court fee payable on appeal should be calculated on Rs. 27,000, which was held to be the value of the appeal before him. Three weeks' time was allowed to the plaintiff to make good the deficiency. Before the expiry of the period, an application was presented on behalf of the plaintiff-appellant which declared that out of Rs. 27,000 found to be due on the mortgage, the plaintiff withdrew his contest to the extent of Rs. 12,894, leaving Rs. 14,106 to which the appeal was confined. The Court fee on this sum amounted to Rs. 610 of which Rs. 165 had already been paid and Court-fees of the value of the remaining Rs. 445 were put in. Then the application said :

"that the valuation of the appeal is fixed at Rs. 14,106, and notice be now issued to the opposite party."

The District Judge dismissed the appeal and the matter was taken up in second appeal. The learned Judge said :

"We are unable to agree with the learned District Judge that the plaintiff's application dated 9th February, 1926, was one praying for reconsideration of the order, dated 7th January, 1926. In substance it was one seeking to amend the valuation of appeal by foregoing part of the claim made in the original memorandum of appeal and by confining it to a lesser amount, *viz.*, Rs. 14,106. It is always open to a plaintiff to reduce his claim and effect a saving of Court-fee if otherwise permissible. In so far as he submits to the decree appealed against, it becomes final, and the appeal is limited to the amount in contest on which alone Court-fee need be paid. The prayer in the concluding part of the application dated 9th February, 1926 : 'that the valuation of the appeal be fixed at Rs. 14,106' clearly shows what the object of the plaintiff-appellant was. He would have been well-advised if consequential amendments in the memorandum of appeal were prayed for, but the substance of what he desired is clearly borne out by the application."

I may here refer to an earlier decision of this Court in *Karumbar Pandarapandaram* v. *Audimula Ponnapandaram.*[2] There a plaintiff to whom a plaint was returned for properly valuing the properties claimed therein, altered the valuation as directed therein and then struck out some of the properties to bring the suit within the jurisdiction of the Court. Abdur Rahim, J., held that that there was nothing illegal in the amendment and that it was competent to the Court to accept such amended plaint. There again it is to be observed that no formal application for amendment was filed and that no order was obtained from the Court allowing the amendment. The plaint was returned. The District Munsiff found that the subject matter of dispute was under-valued and that if properly valued it would exceed the pecuniary jurisdiction of his Court. He therefore returned the plaint for presentation to the proper Court after correcting the valuation in accordance with his finding. The plaintiff amended the plaint by correcting the valuation and also struck off some of the properties from the plaint so as to bring the rest of the claim within the jurisdiction of the District Munsiff. He then represented the plaint in the same Court and put in a petition saying that he had relinquished his claim to the properties which he had struck off. The District Munsiff admitted the plaint and the question was whether he had the power to do so. The learned Judge held that the Court was entitled to admit the plaint. The judgment of Abdur Rahim, J., was confirmed in L. P. A. No. 120 of 1909. Referring to the decision in *Neelachalam* v. *Narasinga Das*[3], the District Judge says this :

"What the decision lays down is that it is open to a plaintiff to relinquish a portion of the claim to bring it within a certain Court fee, but he must set his plaint and fee right within the period prescribed by the Court. The latter direction has admittedly not been complied with in this case."

It is difficult to see what this means. The plaintiff filed a memorandum stating that he gave up item 6 and the third defendant. That is certainly a relinquishment

1. A.I.R. 1929 All. 308.
2. (1909) I.L.R. 33 Mad. 262.
3. A.I.R. 1931 Mad. 716.

of a part of the claim so as to bring it within the Court-fee paid. It is not necessary to file an amendment petition. As stated by the Judges of the Allahabad High Court in *Sah Ramchand* v. *Pannalal*[1], it would have been better if an application for amendment had been filed, but as they said we must look to the substance of what was done and there is no doubt whatever that what the plaintiff asked was for an amendment of the plaint. But even otherwise I am of opinion that there is no necessity to formally apply for amendment of the plaint. A plaintiff has always a right to abandon a part of his claim and for abandonment it is not necessary to file an application for an amendment of the plaint. If he abandons a part of the claim, he has only to intimate the fact to the Court and the Court has only to note it on the plaint and there it ends.

In the result, this second appeal is allowed, the decrees of the lower Courts are set aside and the suit remanded to the trial Court for disposal according to law against defendants 1 and 2 and against items other than item 6. The Court-fees paid on the memoranda of appeal here and in the lower appellate Court will be refunded. The rest of costs will abide and be provided for in the revised decree of the trial Court. This Court is indebted to Mr. P. Suryanarayana who argued the case for the respondents at my instance, they being unrepresented. No leave.

K.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Madirazu Zoga Rao and others .. *Appellants**

v.

Bommadevara Venkatakrishnayya Naidu and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 43—Applicability—Tests.

There is no duty cast on a vendee to make any enquiries in a case to which section 43 of the Transfer of Property Act applies and mere notice of encumbrances on the part of the vendee would not make the transaction of sale any the less a sale free from encumbrances, when the document of sale says so. Before section 43 can apply it is essential that there should be a misrepresentation, fraudulent or erroneous, about the right to transfer property.

What the sale deed professes to transfer is not the only subject to be considered for applying section 43. If at the time of its coming into existence facts relevant to or having a bearing on the sale were mentioned by the vendor to the vendee, and evidence about the same is not ruled out under section 92 of the Evidence Act, they must be taken into account in considering what the vendor professed to transfer. Where it is found on the evidence that the vendee was expressly told about the existence of a prior charge decree for maintenance, the vendee is not entitled to invoke section 43 of the Transfer of Property Act as against a subsequent purchaser of the property in execution of the charge decree though there was an express covenant that there was no prior alienations by the vendor.

Appeal against the decree of the Court of the Subordinate Judge of Tenali in A. S. No. 112 of 1941, preferred against the decree of the Court of the District Munsiff, Repalle in O. S. No. 175 of 1937.

P. Satyanarayana Rao for Appellants.

K. Subba Rao for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are the appellants and the question is whether section 43 of the Transfer of Property Act applies to the facts of this case and can be invoked by the plaintiffs in their favour so as to operate on the title which the first defendant acquired to the property subsequent to the sale in favour of the plaintiffs. Both the Courts have found that the section has no application because the plaintiffs had notice of the charge decree under which the property was brought to sale by the lady who had a right to maintenance. She purchased it in execution of her own decree and subsequently sold it to the first defendant, who is now resisting the title of the plaintiffs who claim under a sale deed executed by the fifth defendant and the first defendant on 21st October, 1929, when the first defendant was a minor represented by his father, the fifth defendant.

1. A.I.R. 1929 All. 308.

* S. A. No. 1272 of 1944. 16th October, 1945.

It is argued for the appellants that, in a case where there is an express covenant that there were no prior alienations, mere knowledge of any subsisting encumbrance on the part of the vendee is not sufficient to prevent the applicability of section 43 where the vendor subsequently acquires a full interest in the property and that there is no duty on the part of the vendee to make any enquiries about the title which the vendor professes to transfer, as there is, for instance, in a case of a transfer by an ostensible owner governed by section 41. In this connection, the famous passage of Lord Halsbury in *Bloomenthal* v. *Ford*[1]:

> "I told you so-and-so; but you ought not to have believed me. You were too great a fool. I had a right to mislead you because you were too great a fool."

was cited and relied upon.

It may be conceded that there is no duty cast on the vendee to make any enquiries in a case to which section 43 applies and that mere notice of encumbrances on the part of the vendee would not make the transaction of sale any the less a sale free from encumbrances, when the document says so. But, before section 43 can apply it is necessary that there should be a misrepresentation, fraudulent or erroneous, about the right to transfer the property. If on the facts there was no such misrepresentation, the very foundation for the application of the section is gone. Both the lower Courts have found on the evidence given by the fifth defendant as D.W. 7 that he showed the sale deed, Ex. XII to the plaintiffs and told them about the maintenance decree of the second defendant. There is no evidence of the plaintiffs to the contrary; in fact they did not go into the witness box. They examined only P. W. 1, who was their agent with a power of attorney; he no doubt states that the plaintiffs were not aware of the decree at the time of Ex. A and that it was not mentioned in the encumbrance certificate, which was produced by the fifth defendant. But this evidence was not accepted. It is thus not a case of constructive notice of an encumbrance sought to be fastened on the strength of a reference in the schedule to the sale deed, Ex. A, to the prior sale deed, Ex. XII. On the other hand, it is a case where it has been found by the Courts below that the plaintiffs were expressly told about the prior maintenance decree. What the sale deed professes to transfer is not the only subject to be considered for applying section 43. If at the time of its coming into existence facts relevant to or having a bearing on the sale were mentioned by the vendor to the vendee, and evidence about the same is not ruled out under section 92 of the Evidence Act, they must be taken into account in considering what the vendor professed to transfer; and to that extent it cannot be said that there was any misrepresentation, fraudulent or erroneous. Consequently section 43 does not apply.

Plaintiffs asked to be allowed to redeem the charge and their suit contained a prayer for this relief, but it appears from paragraph 6 of the judgment of the Subordinate Judge that this alternative relief was not pressed. It cannot be allowed to be raised now, whatever might be the view to be taken on its sustainability.

The second appeal is dismissed with costs.

No leave.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Gangavva and another .. *Prisoners** (*Accused Nos.* 1 *and* 2)

Evidence Act (*I of* 1872), *section* 30—*Several accused tried for a major offence—Confession of one of a minor offence—Admissibility against other accused.*

The word confession in section 30 of the Evidence Act cannot reasonably be interpreted to mean a confession of any offence for which the accused persons are being tried but only of the very offence for which they are being tried, offence always including abetments and attempts.

---

1. (1897) A.C. 156.

* R. T. No. 111 of 1945 and Crl.App. Nos. 419 and 420 of 1945. 28th August, 1945.

Where more than one accused person are tried for murder under section 302, Indian Penal Code and one of them confesses to an offence under section 201, Indian Penal Code, such confession cannot be used in evidence against the other co-accused.

Syed Hussain Sahib v. *Emperor*, (1937) M.W.N. (Crl.) 249; In re *Periyaswami Moopan*, (1930 59 M.L.J. 471 : I.L.R. 54 Mad. 75, followed; In re *Manicka Padayachi*, (1921) 14 L.W. 474, referred to.

Trial referred by the Court of Session of Bellary Division for confirmation of the sentences of death passed upon the said Prisoners—Accused Nos. 1 and 2 in Case No. 12 of the Calendar for 1945 on 3rd July, 1945 and Sessions Case No. 12 of 1945.

P. Basi Reddi and *S. Narasimha Aiyangar* for Accused Nos. 1 to 3.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Horwill, J.—The three appellants were charged in the Court of the Sessions Judge of Bellary under section 302 of the Indian Penal Code with the murder of a boy aged 6 years, named Ramappa, by cutting his throat. The learned Sessions Judge convicted the first and second appellants of the offence with which they were charged and sentenced them to death. He however accepted the explanation by the third appellant in his confessional statement that he took no part in the murder and was not aware that it was going to be committed, and so found him guilty only under section 201 of the Indian Penal Code, because he had buried the knife with which the murder was committed. He was sentenced to 5 years rigorous imprisonment.

As the offence was committed in the house of P. W. 4 during the absence of himself and his wife and there were no persons in the house other than the murdered boy and his little sister aged 3, there are no actual eye witnesses of the murder. But there is important circumstantial evidence of persons who saw the three appellants enter the house of P. W. 4 and who saw them leave again. P. W. 5 was working in his rick yard only 100 yards away from the house of P. W. 4; and he saw the three appellants both enter the house and leave it. P. W. 6 did not actually see the accused leaving P. W. 4's house, but he saw them at 2 or 3 yards from the house as they were emerging from the back-yard. P. W. 7 saw the accused going from their village towards the village of P. W. 4 and asked them where they were going. The third appellant replied that he was going to the house of P. W. 4 to get the two bags of cholam for the first appellant. P. Ws. 8 and 9 were grazing bulls and saw the three appellants going in the direction of P. W. 4's village. They, too, asked the appellants where they were going and why, and the third appellant gave the same answer to them as he had given to P. W. 7. P. W. 4, the father of the murdered boy, was not absent for very long from his house. He left late in the afternoon and came back just at dusk; and it was during his short absence that the three appellants entered the house of P. W. 4 and it was during that time that the boy Ramappa was murdered. It is a reasonable conclusion to draw from the circumstances that the three appellants committed the murder. In the Courts below they all denied that they entered the house of P. W. 4; but we see no reason at all for not accepting the disinterested evidence of these five witnesses.

The learned Sessions Judge took into account against appellants 1 and 2, the confessional statement of the third appellant, (Ex. H) in which he said that thef three of them went from their village along a certain foot-path to the house of P. W. 4, removed the door of the rick yard, and found inside the deceased boy and his little sister playing in the yard. The boy was decoyed into the kitchen by the offer of a two-anna piece and while the third appellant was standing in the padasalai in front of the kitchen door, the first appellant held the little boy over the oven while the second appellant cut his throat with the knife which she had, allowing the blood to flow into the ashes of the oven. He exclaimed "You have ruined my maternal uncle's house!" The first and second appellants, who are women, brought out the weapon used in the commission of the crime wrapped in a piece of blue

cloth. They handed over the knife and the cloth to him asking him to conceal it, which he did. As a result of this confession made to the police, the police and panchayatdars proceeded to the spot indicated by the third appellant, from which he produced the knife wrapped in the cloth.

It has been argued that the above statement is not a confession at all, because the third appellant did not implicate himself in any way; but we have no doubt that it is a confession of an offence punishable under section 201, Indian Penal Code, for he admittedly buried the knife in order to conceal evidence of the murder. The more important question, however, is whether this statement, which amounts to a confession of an offence punishable under section 201, Indian Penal Code, can be used against the first and second appellants in the charge under section 302, Indian Penal Code. The learned Public Prosecutor argues that it is admissible in evidence; and his line of reasoning is this: when a person is charged with a serious offence, he is also charged by implication with every offence comprising any combination of circumstances which may form the constituents of the major offence; so that when a person is tried for murder, and part of the evidence of the murder is the concealment of the weapon with which the murder was committed, then the person charged with the murder is also charged by implication with an offence punishable under section 201, Indian Penal Code: the confession of this minor offence by the third appellant could therefore be used against the other appellants, because they were charged with the minor offence also; if it was admissible against the other appellants, then it can be taken into account against them for all purposes, even though they might be charged with the major offence and convicted of it. In In re *Manicka Padayachi*[1], the learned Judges had to consider whether a confession of an offence that was punishable under section 328, Indian Penal Code, could be used against the other accused to support the evidence that an offence had been committed by him punishable under section 328, Indian Penal Code, when the charge preferred against him was under section 302, Indian Penal Code. The learned Judges differed; and so the matter was referred to a third Judge, Oldfield, J. He pointed out that the person who made the confession had been convicted only under section 328, Indian Penal Code and that that was the section under which the other accused, if the confession were accepted, would also be convicted. That case is therefore not on all fours with the present case; but the learned Public Prosecutor relies on certain *obiter dicta* to be found in the judgment. The learned Judge said:

> "The correct view is clearly that persons under trial for a major offence are also being charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved."

If that were so, then section 237 of the Criminal Procedure Code would seem to be redundant; for a person irrespective of section 237 of the Criminal Procedure Code could then be convicted of a minor offence even though not specifically charged with it. There are two cases to which we have been referred which deal directly with the point raised here. They are In re *Periyaswami Moopan*[2] and *Syed Hussain Sahib* v. *Emperor*[3]. In the former case, Reilly, J., said:

> ". . . . . the confession must be of the kind intended by the Legislature when enacting section 30 (of the Evidence Act). What kind of confession is intended? The words of the section are 'when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved.' In my opinion 'confession' in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, 'offence' always including under the explanation to the section abetments and attempts . . . . In my opinion we must read the word 'confession' as if it were followed immediately by the words 'of that offence' . . . . ."

The learned Judges there refused to accept a confession disclosing an offence under section 201 of the Indian Penal Code against a co-accused tried and con-

1. (1921) 14 L.W. 474.
2. (1930) 59 M.L.J. 471 : I.L.R. 54 Mad. 75.
3. (1937) M.W.N. (Crl.) 249.

victed of murder. In *Syed Hussain Sahib* v. *Emperor*[1], the same question had to be considered, namely, how far a confession of an offence under section 201 of the Indian Penal Code could be used against a co-accused charged with murder. The learned Chief Justice said :

"In the first part of Ex. F (the confession in question) he (the person who made the confession) accused his wife of having committed the murder and would have it that he was away at the time. This statement cannot be taken into consideration so far as it affects the 2nd appellant on the charge of murder. He does not include himself in the accusation, and, therefore, under section 30 of the Evidence Act, this statement cannot be admitted against the wife. Ex. F, can, however, be taken into consideration under section 30 as against both the appellants on the charge under section 201."

The principle laid down in these cases must prevail over the dictum of Oldfield, J.

Although we are holding that in view of the statement of law laid down in In re *Periyaswami Moopan*[2] and *Syed Hussain Sahib* v. *Emperor*[1], the confession of the third appellant cannot be taken into account against the other appellants with regard to the charge under section 302, we are nevertheless satisfied from the evidence of P. Ws. 4—7, referred to above that the first and second appellants are guilty of the offence with which they were charged. The sentence imposed on them is undoubtedly the proper one in the absence of any extenuating circumstances. The murder seems to have been coldly and brutally planned.

The third appellant has preferred a separate appeal. Against him there is the same evidence as against the other two appellants ; but in addition to the evidence of P. Ws. 5 to 9, there is the evidence of his own confession. The learned Judge was prepared to accept the statement contained in the confession at its face value. We think that the appellant was extremely fortunate in the learned Judge's taking this view. He was the only male in the party and was presumably taken in order to play the man's part. It seems incredible that the women would have taken with them a person who might well have been a witness against them unless it was intended that he would participate in the murder. The circumstance that the knife was traced back to him is a further indication that in all probability he himself played the principal part in the murder.

Taking the most lenient view of the evidence against him, the appellant was guilty of an offence punishable under section 201, Indian Penal Code. On his own admission, he stood by and allowed this little boy of six years of age to be murdered before his eyes, without attempting to intervene ; and so the sentence of five years rigorous imprisonment is certainly not excessive.

The convictions and sentences are confirmed and the appeals dismissed.

V.P.S. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

M. A. Narayanaswami Nattar .. *Petitioner**

v.

M. K. Manicka Nattar and others .. *Respondents.*

Arbitration Act (X of 1940), section 23—Reference to arbitration in pending suit—When Court ceases to have jurisdiction to deal with the suit.

In order to vest jurisidiction in the arbitrators to deal with a pending suit, it is necessary that the Court should make an order referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only when the matter is referred to arbitration by the Court in that manner that under sub-section (2) of section 23 of the Arbitration Act, the Court ceases to have jurisdiction to deal with the suit or such matters therein as are referred to arbitration.

Parties to a suit for partition filed a stamped memo in Court stating that they had all executed a muchilika to panchayatdars for settling the suit and praying that the documents filed by the parties into Court might be returned to them for being placed before the panchayatdars. The Court passed the following order : "This is treated as a petition. The commissioner is requested to bring all the books and documents on the 16th." Another order was passed on the 16th in the following terms : "Deliver the books to the plaintiff's pleader for production before the panchayatdars." Some

1. (1937) M.W.N. (Crl.) 249.
2. (1930) 59 M.L.J. 471 : I.L.R. 54 Mad. 75.

* C. R. P. No. 480 of 1945. 20th September, 1945.

months later, the 1st defendant in the suit filed an application in Court praying for an order directing the panchayatdars to return the account books to the Court and to post the suit for trial and proceed with the same. This was opposed by the plaintiff on the ground that there was a valid reference of the suit to arbitration and that the 1st defendant was not entitled to revoke the same.

Held, that the two orders passed by the Court could not be construed as orders of reference to arbitration within the meaning of sub-section (1) of section 23 of the Arbitration Act and that in the absence of an order of reference under section 23, the contention of the plaintiff could not be upheld and that in the circumstances, it was open to the 1st defendant to move the Court for the recall of the account books from the panchayatdars.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Vellore, dated 14th February, 1945, in I. A. No. 1326 of 1944 in O. S. No. 481 of 1939.

T. L. Venkatarama Aiyar for Petitioner.

M. S. Venkatarama Aiyar and *V. Natesan* for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in O. S. No. 481 of 1939 on the file of the District Munsiff's Court, Vellore, is the petitioner. The suit was filed in 1939. It was a suit for partition of joint family properties. A preliminary decree was passed on 23rd February, 1942, and the Court appointed a commissioner for taking accounts and for partitioning the properties. No appreciable progress seems to have been achieved for over two years. On 26th May, 1944, the parties to the suit filed a memo in Court stating that they had all executed a muchilika to panchayatdars for settling the suit and praying that the documents filed by the parties into Court might be returned to them for being placed before the panchayatdars. This was signed by the parties and a further endorsement was made thereon that defendants 3 and 4 had no objection to the handing over of the account books to the plaintiff. The Court appears to have asked for the memo being stamped so that it could be treated as a petition, and thereafter on 10th June, 1944, the following order was passed :

"This is treated as a petition. The Commissioner is requested to bring all the books and documents on the 16th."

On 16th June, 1944, the following order was passed :

"Deliver the books to the plaintiff's pleader for production before the panchayatdars."

This is a case governed by Act X of 1940. Section 21 of the Act, which is in Chapter IV which deals with arbitration in suits, runs thus :

"Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference."

Section 23 provides :

"(1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit."

It will appear that, in order to vest jurisdiction in the arbitrators to deal with a pending suit, it is necessary that the Court should make an order referring the suit to them and should specify in the order such time as it thinks reasonable for the making of the award. It is only when the matter is referred to arbitration by the Court in that manner that under sub-section (2) of section 23 the Court ceases to have jurisdiction to deal with the suit or such matters therein as are referred to arbitration. I find myself unable to construe the two orders passed by the Court on the 10th and 16th June, 1944 as orders of reference to arbitration within the meaning of sub-section (1) of section 23.

It was further argued at one stage that even the application made by the parties for the return of books did not amount to an application for reference to arbitration under section 21 ; but the learned advocate for the petitioner subsequently conceded that having regard to the view taken in some decisions, the present application, Ex. D-1, might for all practical purposes be treated as such an appli-

cation. But that does not serve the purpose, there being no order made by the Court referring the suit to the arbitrators as required under section 23. What happened was that after the arbitrators had gone on for four months with the examination of the accounts, one of them who belonged to Trivandrum left the place. For that reason as also because the first defendant apprehended that the arbitrators were not proceeding along fair and proper lines in their inquiry, he served notices upon the arbitrators in September 1944, asking them to stop further investigation and to return the account books to the Court. He subsequently filed the application, I. A. No. 1326 of 1944 in Court out of which the present petition arises. In that application he prayed for an order directing the panchayatdars to return the account books to Court and to post the suit for trial and proceed with the same. The plaintiff opposed the application mainly on the ground that there was a valid reference of the suit to arbitration and that the first defendant was not entitled to revoke the same. As already stated, I find that in the absence of an order of reference under section 23, that contention of the plaintiff cannot be upheld. In the circumstances, it was open to the first defendant to move the Court for the recall of the account books from the panchayatdars.

Some stress was laid upon the interests of justice not being served, even if there was any material irregularity or illegality in the matter. I find that one of the panchayatdars has gone out altogether and an application has also been filed in Court for the appointment of another panchayatdar in his place. If that should take place, necessarily the entire investigation will have to be done *de novo*. Instead of that process being adopted, the proper course would appear to be, having regard to the altered circumstances, that a commissioner appointed by the Court should examine the accounts and make the division of the properties.

The petition is, therefore, allowed, and the order of the learned District Munsiff reversed.

No order as to costs.

V.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SOMAYYA.

Varisai Ibrahim (deceased) and others .. *Appellants**

v.

Kadir Ibrahim, son of Nalle Ibrahim .. *Respondent.*

Limitation Act (IX of 1908), Article 89—Power of attorney in general terms to collect an outstanding—Collection by agent—Amount not paid to principal—Suit for recovery—Starting point of limitation.

The plaintiff, a resident in Burma, executed a power of attorney in favour of the defendant in British India, for the collection of an outstanding due to the plaintiff from a third party. The power of attorney was couched in very wide terms and was in fact a general power of attorney to manage all his business, and among other things to represent the plaintiff in suits, to execute documents, to register them and so on. The defendant collected the outstanding in question on the 14th June, 1937, and on his failure and refusal to pay it over to the plaintiff, the latter filed a suit for its recovery in 1941. On a question whether the suit was not barred by limitation,

Held, that in the circumstances and in the absence of evidence that the power of attorney was executed only for the purpose of enabling the defendant to collect the amount due to the plaintiff and nothing more, the agency was not restricted to the collection of the suit amount and that there was no reason for holding that the agency terminated on the 14th June, 1937. The suit was therefore within time and not barred by limitation.

Appeal against the decree of the District Court of Ramnad at Madura dated 9th December, 1943 in A. S. No. 721 of 1942, preferred against the decree of the Court of the District Munsiff, Paramakudi, dated 13th October, 1942, in O. S. No. 286 of 1941.

V. Ramaswami Aiyar and *V. Minakshisundaram* for Appellants.

S. K. Ahmed Meeran for Respondent.

---

* S.A. No. 938 of 1944. 19th September, 1945.

The Court delivered the following

JUDGMENT.—Two questions are raised in this second appeal; one is whether the suit is barred by limitation and the other is whether Ex. D-2 was taken *benami* for the benefit of Nalle Ibrahim, the plaintiff's father. Nalle Ibrahim had three sons, one by the first wife and two by the second wife. Ex. D-2 is a usufructuary mortgage taken in the names of the three sons, Naina Mohamed, the son by the first wife, Kadir Ibrahim the plaintiff, and Mohamed Ibrahim, the sons by the second wife. The sum secured was Rs. 1,825 but it is stated that a sum of Rs. 100 was not paid and the real consideration was Rs. 1,725. The document was executed in the name of the father for and on behalf of his three sons just mentioned. At that time the eldest son was about twelve years of age, the plaintiff was about six years old and his younger brother was about five years of age. The mortgagors who executed Ex. D-2 later on sold the property to a third party and the purchaser had to pay the sum of Rs. 1,725 to the othidars. The sale of the equity of redemption was in 1932. By 1933 the eldest son Naina Mohamed had attained majority and he sent a power of attorney in the name of the defendant authorising the latter to collect his one-third share of the othi amount. That one-third share was collected and we are not concerned with it in this suit. By 1937 both the plaintiff and his younger brother attained majority. The younger brother, Mohamed Ibrahim, was in India, and was in a position to collect his share himself. The plaintiff was, however, in Burma. He therefore executed a power of attorney, Ex. D-5, in the name of the defendant and sent it to the defendant. The defendant and the plaintiff's younger brother Mohamed Ibrahim collected a sum of Rs. 1,150 on the 14th of June, 1937. The plaintiff came to India in 1940 and demanded the amount collected on his behalf. The defendant refused to pay and hence this suit. The main defences, as already stated, are that the consideration for the othi Ex. D-2 came from the father and that the document was taken for the benefit of the father *benami* in the names of the three sons. The other defence was one of limitation. The trial Court upheld the defences and dismissed the suit. On appeal the learned District Judge of Ramnad reversed the decision of the trial Court on both the points and gave a decree, and hence this second appeal.

Mr. V. Ramaswami Iyer, the learned Advocate for the appellant, challenges the finding of the District Judge and urges that the suit was barred by limitation, and relies upon the decision of this Court in *Venkatachalam* v. *Narayanan*[1], where it is laid down that where the business of the agency ceases limitation against the agent runs from the cessation of the business and that the fact that the agent did not render account of his agency does not postpone the starting of the limitation. If the agent is to run a business of money-lending in foreign parts under a three years' agency, as is usual among Nattukottai Chettiars, if the agent hands over the account to his succeeding agent and returns to India, limitation for a suit by the principal for an account of the agency starts from the termination of the agency period and this notwithstanding the fact that the agent did not render accounts to the principal. Similarly, where certain goods are entrusted to an agent for sale and all the goods are sold, the agency comes to an end when all the goods are sold and limitation starts then and there, and the fact that the agent did not render an account of his sales to the principal is not relevant. There is no doubt that those decisions would have been applicable if agency in this case had been only for the collection of the suit amount but Ex. D-5 which is the power of attorney executed by the plaintiff in favour of the defendant is couched in very wide terms and is in fact a general power of attorney to manage all his business, and among other things to represent the plaintiff in suits, to execute documents, to register them and so on. There is no proof that the plaintiff had no other property and that the power of attorney was executed only for the purpose of enabling the defendant to collect the amount due under the suit document and nothing more. There is no such plea in the written statement. All that the written statement says is that the amount having

1. (1914) 28 M.L.J. 140: I.L.R. 39 Mad. 376.

been collected in June, 1937, the suit filed in 1941 is barred by limitation. In paragraph 3, clause 4 of the plaint there is an allegation that besides the suit mortgage there was another usufructuary mortgage for Rs. 3,000 taken in the names of the plaintiff and his younger brother which also belonged to them. There is a further allegation that the plaintiff's paternal uncle was managing that property and that that property was handed over to the defendant for management. The defendant no doubt denies that the property covered by the other mortgage was handed over to him for management and he also denies the plaintiff's ownership of the other mortgage right. But there is no evidence on the side of the defendant that the plaintiff did not own any other property. Even if the plaintiff did not own any other property at the time of Ex. D-5, it may well be that the parties anticipated that there might be an occasion for the defendant to act for the plaintiff at a future time and therefore executed Ex. D-5, in the terms contained in it. If the power of attorney was intended only to authorise the second defendant to collect this amount and nothing more, there was no need to draft the document as a general power of attorney. All that need be said was that the defendant was authorised to receive the particular amount from the debtor in question. I therefore hold that the agency was not restricted to the collection of the suit amount and that there is no reason for holding that the agency terminated as soon as the collection was made on the 14th June, 1937. If that is so there is no evidence that the agency terminated more than three years before the suit or that there was a demand for account and a refusal more than three years before the suit. The suit must therefore be held to be in time.

The next question is whether Ex. D-2 was taken *benami* for the father and whether the father was the real owner. This is a question of fact and the burden of proving the *benami* nature is upon the person setting up the *benami*.

[His Lordship after discussing the evidence, held, that there was evidence in support of the conclusion of the lower appellate Court and that the appellant was not entitled to go behind that finding of fact in second appeal.]

The result is that the second appeal fails and is dismissed with costs. (No leave).

V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Lahore.)

PRESENT:—LORD THANKERTON, LORD PORTER, LORD GODDARD, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Malak Khan .. Appellant*

v.

The King-Emperor .. *Respondent.*

Criminal trial—Evidence—Use in appeal of evidence in respect of one offence of which the accused is acquitted as corroborative evidence of the guilt of the same accused in respect of another offence with which also he was charged and convicted—Legality—Charge of murder as against six and in addition of robbery as against the appellant and another only—Conviction of all for murder—Acquittal of the two of robbery—Appeal—Acquittal of five—Conviction of appellant alone confirmed—Use of evidence of robbery as corroborative evidence of the guilt of the appellant—Legality—Criminal Procedure Code (V of 1898), *sections* 103 *and* 165*—Search—Presence of witnesses—Object of—Applicability and object of section* 165*—Criminal trial—Duty of the prosecution—Calling in of all crown witnesses—Interference by the Privy Council in criminal matters—Wrong evaluation of evidence.*

Six persons were charged jointly under sections 302/325/149, Indian Penal Code and two of them, the appellant and another, were charged in addition with the offence of robbery under section 392, Indian Penal Code. The Sessions Court convicted all the accused of murder under section 302/149 and of causing grievous hurt under section 325/149 and acquitted the appellant and the other of the charge of robbery with which also they had been charged. But on appeal the High Court on a consideration of the entire evidence, held that the appellant should be taken to have participated in the crime and that the case regarding the others was doubtful and accordingly allowed the appeals of the five other accused persons and confirmed the conviction of the appellant on the charge of murder. On an appeal by that accused it was contended that in the appeal by him from his conviction for murder the High Court should not have

* P. C. Appeal No. 20 of 1945. 3rd July, 1945.

accepted as corroboration of his guilt evidence given in the Sessions Court which was material to both the charges before it of murder and robbery but failed to convince that Court of the guilt of the appellant of the crime of robbery and resulted in his acquittal of that charge.

Held, negativing such a contention, that the trial Court had only found the offence of robbery not proven. But even if that Court had disbelieved the whole evidence in regard to robbery, its finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or no. The acquittal no doubt would have entitled the appellant to plead *autrefois acquit* if again charged with the same crime, namely robbery, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence. It could not be objected to as evidence in another case, criminal or civil, though its weight would be diminished. Before the Sessions Judge it was given for two purposes—(1) as corroboration of the testimony given in the charge of murder and (2) as direct evidence of robbery. Before the High Court its use for the first purpose was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery.

The presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to be given.

Where the articles are produced by the accused himself, section 165, Criminal Procedure Code, does not apply. The section is meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it. Where the section applies, there would be no necessity to call either of the witnesses to the search having regard to the express terms of section 103 (2) of the Criminal Procedure Code.

It is no doubt very important that, as a general rule, all crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desires to prove. Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole, and arrive at its conclusion accordingly taking into consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

For their Lordships of the Privy Council to interfere with the decisions of Courts in India in criminal matters, it requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given. It would not interfere " unless it be shown that, by a disregard of the forms of legal process, or otherwise, substantial and grave injustice has been done."

[The appeal was heard on the 27th, 28th June in the presence of Lord Goddard, Sir Madhavan Nair and Sir John Beaumont. At the end of the hearing on the second day, Lord Goddard announced that owing to the difficulty and importance of the case it would have to be re-argued before a Full Board. The appeal was reheard before a Full Board on the 3rd July, 1945.]

A. G. P. Pullan for Appellant.

J. M. Pringle for Respondent.

CONCISE STATEMENT OF FACTS.—

This is an appeal by way of special leave from a judgment of the High Court of Judicature at Lahore, dated the 18th October, 1944, which dismissed the appeal of the appellant from his conviction by the Sessions Judge of Jhelum of the murder of one Akbar Khan and confirmed the sentence of death passed upon the appellant by the Sessions Judge.

The appellant and five others were charged jointly with the murder of Akbar Khan, under sections 302/325/149 of the Indian Penal Code. The appellant and one other were also charged separately under section 392 on an allegation that they committed robbery at the same time by forcibly removing from the person of Akbar Khan (deceased) a purse, ring, receipts and a revenue fard.

The trial Court found all the accused guilty under sections 302/325/149, and sentenced them to death. The appellant and the other accused were found not guilty on the charge of robbery under section 392.

On appeal the High Court found five of the accused not guilty of any offence, and ordered their immediate discharge; the appellant's conviction under section 302 was upheld, and the death sentence was confirmed. The High Court in arriving at this conclusion, relied also on the evidence as to the robbery which had been rejected by the Sessions Judge.

The main legal point for decision in this appeal is whether in a trial for murder and robbery, evidence which has been disbelieved by the Trial Court on the charge of robbery, can be accepted by the High Court on appeal as corroborative evidence of murder, although the charge of robbery has resulted in an acquittal.

ARGUMENT :

A. G. P. Pullan for the appellant.—Opens appeal states general nature of the case.

Lord Goddard.—Finding of the deceased's goods on the accused might be corroborative evidence of murder.

Pullan.—Reads evidence of the witnesses, which in his submission should have been disregarded.
Reads High Court Judgment.

Lord Goddard.—If the High Court found the evidence unsuitable against the other five accused, it seems that to convict the appellant on the same evidence is singularly unconvincing.

Pullan.—The requirements of section 165 of the Code of Criminal Procedure, were not followed.

Pringle.—In my opinion section 550 is more relevant.

Pullan.—Refers to sections 102, 103 of the Code of Criminal Procedure. The two witnesses to the recovery memo., and who signed the same, were Crown witnesses, and should have been called by the Crown at the hearing, to testify.

J. M. Pringle for the respondent.—Refers to practise of the Judicial Committee in criminal matters. Cites *Arnold* v. *The King-Emperor,* L.R. 41 I.A. 149 at 170: 26 M.L.J. 621 and *Mohamed Nawaz* v. *The King-Emperor,* L.R. 68 I.A. 126: (1941) 1 M.L.J. 5.

Deals with the corroborative evidence against the appellant.

Lord Goddard.—We will have to consider whether this case comes within the rules laid down.

Pringle.—Refers to section 423 of the Code of Criminal Procedure. The High Court has power to reverse acquittal by the Sessions Judge.

In any case there has been no miscarriage of justice.

Pullan replied.—Refers to Re *Dillet,* 12 A.C. 459.

Lord Goddard.—You may be assured of a sympathetic hearing; it is open to strong comment that the Crown did not call the two witnesses to the recovery memo.

Their Lordships' Judgment was delivered by

LORD PORTER.—This is an appeal from the judgment of the High Court of Judicature at Lahore dated the 18th October, 1944, dismissing the appellant's appeal from the judgment of the Sessions Judge of Jhelum dated the 1st July, 1944, and confirming the sentence of death passed upon him.

Special leave to appeal to His Majesty in Council was granted by an Order in Council dated the 21st March, 1945.

The main legal point for decision in this appeal is whether in an appeal from a conviction of murder, the High Court is entitled to accept, as corroboration of the guilt of the accused, evidence (given in the Sessions Court where the charge was one of murder and robbery) which was material to both charges but failed to convince the Sessions Court of the guilt of the accused of the crime of robbery with the result that he was acquitted of that charge.

Akbar Khan was a lambardar of the village of Bahl, and he and his brother-in-law Nur Khan were waylaid on the 6th January, 1944, on their way back from the village of Munara three or four miles distant, where Akbar Khan had been collecting land revenue. The time at which the assault took place is disputed, but the finding of the Courts in India is that it was between 4 and 5 p.m. Both men received severe injuries apparently with blunt weapons, and Akbar Khan died the same evening. Nur Khan survived and was a witness in the case.

The first information report was registered at the Police Station of Buchal Kalan at 10 a.m. on the 7th January, 1944, but is said to have been taken down at an outlying post at 4 a.m. by an Assistant Sub-Inspector of Police. The maker of the report Imam Din said that he had heard of the affair from one Mohammad Nawaz and that he had gone to the spot and heard a statement made by Akbar Khan, who subsequently died on the road. The persons named as the assailants were Umar Hayat, Malak Khan, appellant, Nur Alam, Gulsher, Aurangzeb and Sarsa, all residents of the village of Bhal.

In the course of investigation Nur Khan and two witnesses, said to be eye-witnesses, told the police that Umar Hayat and the appellant had taken from Akbar Khan a black purse containing money and a list and a gold ring.

As a result of this information it is said that on the 8th January, 1944, Inspector Lutaf Khan and two other police officers who were taking part in the investigation went together with one Fateh Khan and one Allah Yar Khan to the appellant's house and there recovered the purse, money, list and gold ring which it was alleged the appellant had told the Inspector he had buried in his garden. The articles are said to have been buried under a stone and thence dug up and produced by the appellant. The Inspector thereupon, as he says, drew up a search list dated

the 8th January, and it was signed by the three police officers and the two others who were present.

On the 29th February, 1944, separate charges were framed by the Magistrate, namely (1) against all six accused

"that they committed murder by intentionally causing the death of Akbar Khan in prosecution of the common object of the unlawful assembly and caused grievous hurt to Nur Khan"

under sections 302/325/149 of the Indian Penal Code, and (2) against Umar Hayat and Malak Khan only that they committed robbery by forcibly removing the articles described above from the person of Akbar, under section 392 of the Indian Penal Code. The trial under those charges was conducted before the Sessions Judge of Jhelum from the 27th to the 30th June, 1944.

The prosecution examined Nur Khan, Mohammad Nawaz and Alam Khan who professed to be eye-witnesses of both offences, Imam Din who made the report, Mussammat Begam mother of the deceased and Mohammad Ismail whom he visited shortly before his death. The three police officers gave evidence for the prosecution, but the Inspector alone spoke to the finding of the articles alleged to have been stolen. The Crown called neither of the attesting witnesses of the search list.

Allah Yar Khan was, however, summoned as a defence witness to prove an alibi for Umar Hayat and Aurangzeb and in the course of his evidence alleged that Imam Din had told him that the appellant had been one of the assailants. As to the search he said in examination in chief:

"The A. S. I., S. I., Inspector, Fateh Khan and myself went to the house of Malak Khan, but Malak Khan was not with us. The Inspector himself removed the stone and took out the purse, etc. The stones were lying near the entrance to the courtyard by the side of the wall which is not very high. I do not remember if there is any berry-tree there. A man standing outside the compound wall could have placed the purse, etc., from where the articles were recovered. The residential kotha (house) of Malak Khan is about 25 or 30 yards from those stones."

In cross-examination he said:

"The fard (list) Ex. P.C. about the recoveries made from Malak Khan's courtyard is signed by me. I signed the fard without reading or understanding it. The fard was not read out to me. I was merely told that I was to sign the memo. of recovery *re* purse etc. The A. S. I. held the papers in his own hand when I signed the fard. It was neither dark nor light at the time of the recovery. The fard was not made out at the spot, but at the dera (office)."

Other witnesses belonging to the village of Munara gave evidence to the effect that the attack was made after sunset, that Akbar had set out after taking an evening meal with Falak Sher D. W. 5, and that the first statement of Nur Khan had been that he did not recognise the assailants, whose faces were bandaged.

Two of the Assessors were for convicting all six accused, and one for convicting all but Hayat and Aurangzeb, who pleaded alibi.

The Sessions Judge in his judgment dated the 1st July, 1944, said it was clear that enmity did exist between the parties.

He dealt with the alleged recovery of the stolen property by saying:

"Nothing at all about these articles was mentioned in the first information report which was lodged on the same day by Imam Din P. W. 6, a brother-in-law of the deceased. The story about the robbery of this ring, etc., was mentioned for the first time on the next day, *i.e.*, the 7th January, 1944, in the inquest report Ex. P. 9, prepared by Assistant Sub-Inspector Man Mohan Lal P. W. 13. It is significant that the inquest report is silent as to who actually disclosed these facts about the removal of the ring, etc., before the Asistant Sub-Inspector."

"The case for the prosecution is that subsequently these articles were recovered from the courtyard of Malak Khan accused on the 8th January, 1944, when Malak Khan himself produced them before Inspector Lutaf Khan P. W. 15, from under a stone in his courtyard."

"It is difficult to understand why the accused should have committed this robbery and particularly of such things as the receipts Ex. P. 3 and Fard Ex. P. 4 which could be of no use to them at all, unless they merely wanted to place some evidence against themselves at the disposal of the police. I will ignore this part of the story and concentrate on the main case about the assault committed by the accused on Akbar Khan deceased and Nur Khan P. W. 3."

The learned Judge nevertheless accepted the evidence of the eye-witnesses to the attack and convicted all the accused of murder under section 302/149 of the

Indian Penal Code and of causing grievous hurt under section 325/149 of the Indian Penal Code, but said :

"The case under section 392, Indian Penal Code (robbery) does not appear to me to be established and I acquit all the accused of that charge."

Their Lordships would observe that the learned Judge had failed to notice that only Umar Hayat and the appellant were accused of robbery, but so far as this appeal is concerned the fact appears to be immaterial.

Three appeals were presented to the High Court at Lahore, one by Umar Hayat, Malak Khan, Nur Alam and Aurangzeb, a second by Gulsher and a third by Sarsa, and all the death sentences were referred for confirmation.

The judgment of the High Court was delivered on the 18th October, 1944, by Teja Singh, J., with whom Bhandari, J., agreed. They apparently regarded the appellant as the principal culprit and decided that there was at least one incident proving the existence of serious ill-will between Malak Khan on one hand and Akbar Khan, Nur Khan and Alam Khan on the other and providing a motive for Akbar Khan's murder.

As to the time at which it was alleged that the first information report had been made, they disbelieved both Imam Din who made it and the Assistant Sub-Inspector who wrote it, regarded it as having been made at a much later time than that given in evidence and drew the conclusion that the deceased was unconscious when Imam Din arrived and that the statements which were said to have been made to Imam Din by him were inventions pure and simple.

The learned Judge placed little reliance on the evidence of Mohammad Nawaz and Alam Khan and even of the injured Nur Khan, of whom he says :

"The result in my opinion is that it is highly unsafe to act upon his statement unless it is corroborated by any other evidence of unmistakable character or by circumstances the correctness of which cannot be denied."

In his view, apart from the general tendency in cases of this nature to rope in innocent persons, Nur Khan and Imam Din were not the kind of persons who would scruple in confining themselves only to the men who were really guilty. He then proceeds :

"The only corroborative evidence that we have in this case is with respect to Malak Khan. Nur Khan stated that after the deceased and he had been injured Umar Hayat removed a purse, a ring and some papers from the deceased's pocket and made them over to Malak Khan. Malik Lutaf Khan, Inspector of Police, deposed that he reached the spot on the 8th and Malak Khan informed him that he had concealed the purse, etc,, in his courtyard. After that he took the Inspector and his companions to the courtyard of his house and from underneath a few stones he produced the purse Ex. P. 1, ring Ex. P. 2 and fard Ex. P.4. We are also told that the purse contained a few papers including a receipt which evidently belonged to the deceased. The mother of the deceased identified the purse and the ring. The learned Sessions Judge has disbelieved the factum of theft and has taken the view that this part of the prosecution story was not true. This finding of his is not correct. There is no reason to disbelieve the evidence of the Inspector so far as the recovery of the articles is concerned. One of the appellant's own witnesses who had attested the memo. evidencing the recovery admitted that the purse, etc., were recovered by the Inspector from a heap of stones lying in the courtyard of Malak Khan's house."

He goes on to say that it was contended that it was a fake recovery but gives easons for rejecting that view and concludes :

"The result, in my opinion, is that Malak Khan should be taken to have participated in the crime and the case regarding the others is doubtful."

The High Court accordingly allowed the appeals of the five other accused persons, but confirmed the sentence of death passed on the appellant under section 302 of the Indian Penal Code. They do not mention section 325 of the Indian Penal Code and leave the question of rioting open.

From this conviction and sentence the appellant obtained special leave to appeal to His Majesty in Council, the substantial ground being that

"in view of the acquittal under section 392 of the Indian Penal Code it was not open to the Court to review the finding of the Court of Sessions Judge as to the recovery of these articles supported as it was by the evidence of the only search witness examined and by the probabilities of the case."

Indeed this argument was put in the forefront of the appellant's case. The Sessions udge, it was said, had acquitted the appellant of robbery; he was therefore not

guilty of that offence ; no appeal had been taken against that acquittal and therefore no Court was entitled to take into consideration the allegation upon which the accusation of robbery was founded even as corroborative evidence in another case.

Their Lordships cannot accept this contention. The learned Sessions Judge did not in fact find the accusation baseless ; he only found the crime not proven. But even if he had disbelieved the whole story of the recovery of the stolen property from the appellant, his finding would not prevent the High Court from weighing its value and if they accepted its substantial truth from taking it into consideration in determining whether another crime had been committed or no. The acquittal no doubt would have entitled the accused man to plead *autrefois acquit* if again charged with the same crime, but it would not prevent a civil action being brought against him for the return of the things stolen or for their value upon the same evidence.

It could not, in their Lordships' opinion, be objected to as evidence in another case, criminal or civil, though no doubt its weight would be diminished. Before the Sessions Judge it was given for two purposes—(1) as corroboration of the testimony given in the charge of murder and (2) as direct evidence of robbery.

Before the High Court its use for the first purpose was in no way precluded even though no appeal was taken against the dismissal of the charge of robbery.

In such circumstances to appeal from the acquittal would be a mere idle form when the question at issue was whether the accused man was guilty of murder or not.

In their Lordships' view the conviction recorded by the High Court cannot be challenged on this ground.

Two further arguments were, however, put before their Lordships in support of the appellant's case.

In the first place it was said that the two witnesses who saw the articles recovered should have been called by the Crown. The argument was put in two ways. It was said that the requirements of section 165 of the Indian Code of Criminal Procedure were not followed. That section enacts :—

"(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purpose of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may after recording in writing the grounds of his belief and specifying in such writing so far as possible the thing for which search is to be made, search or cause search to be made for such thing in any place within the limits of such station."

"(4) The provisions of this Code as to search warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section."

Section 102 need not be quoted but section 103 provides :

"(1) Before making a search . . . . . the officer or other person about to make it, shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attest and witness the search."

"(2) The search shall be made in their presence and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses ; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it."

In their Lordships' opinion the presence of witnesses at a search is always desirable and their absence will weaken and may sometimes destroy the acceptance of the evidence as to the finding of the articles, but their attendance at the search is not always essential in order to enable evidence as to the search to be given.

Where, as here, it is alleged and proved that the articles were produced by the accused man himself, section 165 does not apply. That section is meant to be used in cases where a search warrant would be made use of in the ordinary course, but lack of time renders it impolitic to use it.

If the section did apply, proof of the search might be inadmissible for other reasons, but there would be no necessity to call either of the witnesses to the search having regard to the express terms of section 103 (2).

But a further objection has been taken : it is said that the two witnesses to the search were Crown witnesses and should have been called by the prosecution and that, as the provisions of section 103 (2) do not apply, the rule that the Crown should call or at least tender all its witnesses should be followed.

Their Lordships do not stay to consider whether in truth the two witnesses to the search are properly described as witnesses for the Crown since the argument breaks down on a wider ground. It is no doubt very important that, as a general rule, all Crown witnesses should be called to testify at the hearing of a prosecution, but important as it is, there is no obligation compelling counsel for the prosecution to call all witnesses who speak to facts which the Crown desires to prove.

Ultimately it is a matter for the discretion of counsel for the prosecution and though a Court ought, and no doubt will, take into consideration the absence of witnesses whose testimony would be expected, it must judge the evidence as a whole and arrive at its conclusion accordingly taking ito consideration the persuasiveness of the testimony given in the light of such criticism as may be levelled at the absence of possible witnesses.

These views have often been expressed by their Lordships and are to be found in their latest form in a judgment of the Board pronounced in May, 1944, in the case of *Adel Muhammed El Dabbah* v. *Attorney-General of Palestine.*[1]

The arguments so far considered have been objections aimed at establishing that there was error in law in the conduct of the case.

For the reasons they have given their Lordships think that this contention has not been made good. Apart from this objection the only remaining ground of attack on the conviction and sentence is not that wrong evidence was admitted or that there was no evidence on which a conviction would be based, but that the evidence had been wrongly evaluated and was not of sufficient weight to justify the conclusion reached.

It has many times been pointed out that for their Lordships to interfere it requires more than an allegation or even proof that a Court might take a different view of the compelling force of the evidence given. The grounds on which their Lordships' Board are justified in interfering with the decisions of Courts in India in criminal matters have been the subject of numerous statements, the last of which was made at a Board held on the 16th July, 1941,[2] when Viscount Simon (L.C.), pronouncing the view of their Lordships, quoted the well-known passages from Lord Watson's words in delivering the opinion of their Lordships in Re *Dillet*[3] :

> "The rule has been repeatedly laid down and has been invariably followed, that His Majesty will not review, or interfere with, the course of criminal proceedings, unless it be shown that, by a disregard of the forms of legal process, or otherwise, substantial and grave injustice has been done."

It has not been established before their Lordships that there has been a disregard of the forms of legal process in the present case or that grave or substantial injustice has been done and for these reasons their Lordships will, as they have already indicated, humbly advise His Majesty that this appeal should be dismissed.

Solicitors for Appellant : *Douglas Grant & Dold.*

Solicitors for Respondent : *The Solicitor, India Office.*

H.J.U./V.S. *Appeal dismissed.*

---

1. A.I.R. (1945) P.C. 42.
2. (1942) 1 M.L.J. 5 : L.R. 68 I.A. 126.
3. (1888) 12 A.C. 459.

[PRIVY COUNCIL.]

(On appeal from The Protectorate Court of the Somaliland Protectorate).

PRESENT :—LORD PORTER, LORD SIMONDS AND LORD GODDARD.

Mohamed Sugal Esa Mamasan Rer Alalah . . . . *Appellant**

v.

The King . . *Respondent.*

Indian Oaths Act (X of 1873), section 13—Applicability—Section, if confined to cases where the omission to administer the oath occurs per incuriam—*Reception of evidence of unsworn evidence from a child—Corroboration, if necessary for acting upon it—Rule of law and rule of prudence.*

By paragraph 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act and the Indian Oaths Act are expressly applied to Somaliland.

The question before the Board was whether the law in force in the Protectorate of Somaliland permits the Court to receive evidence from a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers and act upon it though there is no corroboration.

Held, that as section 13 of the Indian Oaths Act which governed the matter was quite unqualified in its terms and there was nothing to suggest that it was to apply only where the omission to administer the oath occurs *per incuriam*, such evidence would be admissible. Once there was admissible evidence it could be acted upon ; corroboration, unless required by statute, goes only to the weight and value of the evidence.

14 B.L.R. 294 and 10 Oudh Cases, 337, Approved.

As far as India is concerned this point has been settled by the Proviso to section 5 of the Oath's Act, added by the Amending Act of 1939.

In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn, but this is a rule of prudence and not of law.

A. G. P. Pullan for Appellant.

Frank Gahan for Respondent.

CONCISE STATEMENT OF FACTS :

This is an appeal *in forma pauperis* by special leave from the judgment of the Protectorate Court of Somaliland dated the 22nd, July, 1944, dismissing the appellant's appeal, and confirming the sentence of death passed on him by the trial Court, for the offence of murder under section 302 of the Indian Penal Code.

By paragraph 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act, 1872, and the Indian Oaths Act, 1873, are expressly applied to Somaliland.

The admissibility of the evidence of a young child in Somaliland is governed by section 118 of the Indian Evidence Act.

The Indian Evidence Act contains no provisions for the administration of an oath, or solemn affirmation; this is contained in sections 5, 6, 13 of the Indian Oath's Act of 1873, and the Proviso to section 5 of the Oath's Act, added by the Indian Oath's Amendment Act, 1939.

The actual facts of the case appear sufficiently from the Reasons for the Report given by their Lordships.

The principal question of law to be determined in this appeal, is whether a conviction for murder can be based on the statement of a child who was not examined on Oath or Solemn Affirmation.

The other point is, assuming such evidence was admissible, the conviction could stand on the uncorroborated evidence of a child.

ARGUMENT :

A. G. P. Pullan for the Appellant.—My first submission will be that the evidence of the child Sudio is not admissible at all, as it was unsworn. In *R.* v. *Sewa Bhogta*, 14 B.L.R. 294, which deals with section 13 of the Oaths Act, the majority of the Judges held that the word "omission" in section 13 meant any omission, and it was held that the evidence of a child to whom the oath had not been administered was admissible, the minority dissented from this view ; this controversy has been going on ever since as is shown by the following cases, I.L.R. 10 All. 207, I.L.R. 6 Luck. 210, I.L.R. 41 C. 406, 10 Oudh Cases 337, and (1940) Rang. L.R. 104. The last mentioned is the latest on this point.

The Courts in Somaliland acted without any knowledge of the Indian Act of 1939 adding a Proviso to section 5 of the Oaths Act.

My second submission is that supposing the child's evidence was admissible, is it good without corroboration ? This is unsworn evidence and therefore not on the same footing as sworn.

Lord Porter.—Is there any authority in India which says that you cannot act on the uncorroborated evidence of a child ?

Pullan.—No there are no such statutory provisions in any of the Indian Acts, but in case after case the Courts in India, have refused to act on the uncorroborated evidence of a child, especially

* P. C. A. No. 49 of 1945. 31st July, 1945.

when that evidence was unsworn. *Fatu* v. *R.*, 6 Pat. L.J. 147 and *R.* v. *Shara*, 16 Bom. 359, both referred to by the trial Court; these cases do not establish that it is proper for a Court to convict even in a murder case, on the unsworn testimony of a child as held by the trial Court.

Lord Goddard.—In the present case and the two others cited, both Courts held that the evidence was admissible, but in the present case the Court accepted it, in the other they rejected it : so it is only a question of the weight and value to be attached to such evidence.

Frank Gahan, for the *Respondent followed.*

Lord Porter.—Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The reasons will be given later.

Their Lordships' Judgment was delivered by

LORD GODDARD.—Their Lordships now give their reasons for the advice they humbly tendered to His Majesty on July 31st that this Appeal should be dismissed.

The appellant together with his brother Elmi was charged on July 22nd, 1944, before the Protectorate Court of Somaliland with the murder of his half-brother Abdillahi on or about May 17th, 1942. The Judge of the Court convicted the appellant and sentenced him to death, and acquitted Elmi. The conviction and sentence were confirmed on appeal by the Military Governor sitting as Judge of the Protectorate Court on the appellate side and the appellant subsequently obtained special leave to appeal to His Majesty in Council. The ground upon which special leave was given was that the Court had admitted and acted upon the unsworn evidence of a girl of 10 or 11 years of age whom the Judge found was competent to testify but whom he did not consider was able to understand the nature of an oath. It was conceded by the Crown that if her evidence was inadmissible, not being given on oath, there was not sufficient evidence to warrant a conviction. In substance the only question for decision is whether the law in force in the Protectorate permits the Court to receive evidence from a person who does not understand the nature of an oath but is otherwise competent to testify, as understanding the questions put and being able to give rational answers. It is only necessary to give a very brief statement of the facts as the whole question is one of law.

There had been a dispute between the appellant and the deceased about a she-camel, which had been decided on May 16th, 1942, in favour of the latter by a native tribunal, and the appellant had been heard to utter threats against him. On the next day the deceased was murdered, and his body was found near the camp in which both he and the appellant were living. There was evidence that the appellant was seen at the camp just after the body was found and that immediately afterwards he and his brother disappeared and made no attempt to trace the murderer of their half-brother and so become entitled to blood-money. They did not return to the camp for about six months and were arrested in consequence of some other dispute about property and charged with the murder rather more than a year after it had been committed. The witness whose evidence is in question in this appeal is a girl named Sudio Mohamed, who at the time of the murder was not more than 10 years old and she was tendered by the Crown as an eye-witness of the crime and as having given the alarm at the camp which led to the finding of the body. It is stated by the trial judge that she appears to be intelligent for her age and that she gave her answers frankly and without hesitation.

By paragraph 16 of the Somaliland Order in Council, 1929, the Indian Evidence Act, 1872, and the Indian Oaths Act, 1873, are expressly applied to Somaliland. Section 118 of the Evidence Act is in these terms :

"118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

The material sections of the Oaths Act are sections 5, 6 and 13 which provide as follows :

"5. Oaths or affirmations shall be made by the following persons :—

All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence.

* * * * *

"6. Where the witness, interpreter or juror is a Hindu or Muhammadan, or has an objection to making an oath he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter, or juror shall make an oath."

"13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth."

In India the question has more than once arisen whether the omission to take an oath referred to in section 13 of the Oaths Act applies to a case where the Court deliberately refrains from administering the oath to a witness, or only to cases where the omission is due to some accident or negligence, and opinion on the subject has not been unanimous. It is unnecessary to set out all the cases but their Lordships will refer to three of them.

Soon after the passing of the Act the question came before the High Court of Bengal in *R.* v. *Sewa Bhogta*[1], where a majority of the Full Bench, Jackson, J., dissenting, held that the section being unqualified in terms did apply to a case where the Court accepted the evidence of a child to whom the oath was not administered on the ground that the witness did not understand its nature. On the other hand in Allahabad, Mahmood, J., in an elaborate judgment refused to follow that case, and preferred the view of Jackson, J., that in such circumstances the evidence was inadmissible—*Queen Empress* v. *Maru*[2]. The other case to which their Lordships would refer is *Ram Samujh* v. *King Emperor*[3] in which an instructive judgment was given by Greeven, A.J.C., agreeing with that of the Bengal High Court.

In their Lordships' opinion the decision of the Bengal High Court and in the case in 10 Oudh Cases are right. Section 13 of the Oaths Act is quite unqualified in its terms and there is nothing to suggest that it is to apply only where the omission to administer the oath occurs *per incuriam.* If that had been the intention of the Legislature it would have been simple to insert words in the section to that effect. No doubt, however, it was recognised that in some backward communities there may well be persons capable of understanding the necessity and duty of speaking the truth without appreciating the religious or moral obligations imposed by taking an oath. It is not to be supposed that any Judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness. It may be observed that this question can no longer arise in India because in 1939 the Indian Legislature passed the Indian Oaths (Amendment) Act (Act XXXIX of 1939), which settles the law in accordance with the Bengal and Oudh decisions referred to above. A question was raised in this Appeal as to whether that Act applies to Somaliland but in view of the opinion which their Lordships have formed as to the true construction of section 13 of the unamended Act they do not find it necessary to decide it and accordingly they express no opinion as to whether the amending Act is part of the law of Somaliland.

It was also submitted on behalf of the appellant that assuming the unsworn evidence was admissible the Court could not act upon it unless it was corroborated. In England where provision has been made for the reception of unsworn evidence from a child it has always been provided that the evidence must be corroborated in some material particular implicating the accused. But in the Indian Act there is no such provision and the evidence is made admissible whether corroborated or not. Once there is admissible evidence a Court can act upon it; corroboration, unless required by statute, goes only to the weight and value of the evidence. It is a sound rule in practice not to act on the uncorroborated evidence of a child, whether

1. (1874) 14 B.L.R. 294 (F.B.).
2. (1888) I.L.R. 10 All. 207.
3. (1907) 10 Oudh Cases 337.

sworn or unsworn, but this is a rule of prudence and not of law. In a careful and satisfactory judgment the Judge of the Protectorate Court shows that he was fully alive to this rule and that he applied it, and their Lordships are in agreement with him as to the matters he took into account as corroborative of the girl's evidence. There is no fault to be found with the judgments of either Court and their Lordships have humbly so advised His Majesty.

Solicitors for Appellant: *A. L. Bryden & Co.*

Solicitors for Respondent: *Burchells.*

H.J.U./V.S. *Appeal dismissed.*

[PRIVY COUNCIL.]

(On Appeal from the High Court of Judicature at Bombay.)

PRESENT:—LORD THANKERTON, LORD GODDARD AND SIR JOHN BEAUMONT.

Sohrabji Dhunjibhoy Medora and another .. *Appellants**

v.

The Oriental Government Security Life Assurance Company Limited .. *Respondents.*

Contract—Contract of agency of a life insurance company—If terminable on notice—Construction of the contract as contained in the letters between the parties—Length of reasonable notice—Claim for commission on renewal premiums after termination of agency either under the contract of agency or under the provisions of the Indian Insurance Act—Maintainability—Indian Insurance Act (IV of 1938), sections 2 (10), 40 (1) and 44—A company acting as agents of an insurance company employing a number of sub-agents—Position of—If an "insurance agent" under the Act—Notice of termination of the agency—When operates—Section 44—Scope and nature of right conferred by—Applicability of section to contract of agency prior to the date of the Act—Right to damages for breach of contract preventing the deriving of benefit under section 44—Proviso to section 44 if debars relief to agent doing a small amount of outside business with the consent of the employer.

The contract between the parties on the construction of which the decision of the case depended was contained in certain letters which passed between the parties or their predecessors in the years 1892, 1899 and 1917.

In July 1892, one D. J. M. the father of the plaintiffs, appellants, who was carrying on business in the name of D. J. M. & Co. wrote to the respondents, a company carrying on business of life insurance (between whom there were negotiations for the appointment of the former as the agent of the latter for a particular area) agreeing to accept the agency subject to an understanding on a point in the following terms: "that the premium of persons assured through my agency should be always subject to my commission so long as they remained within the province of Guzerat whether the premium be remitted through my offices or direct."

The manager of the respondents replied to this on the 9th July, as follows: "we have no objection to agree to it as now put. I accordingly have pleasure in formally appointing you Chief Agent for Guzerat. The Agency would stand in the name of D. J. M. & Co. but as already explained you alone would be our recognised agents and would be solely responsible. On your retiring or otherwise discontinuing the work the agency would cease and your partner would have no claim thereunder."

On the 9th February, 1899, D. J. M. wrote to the respondents requesting them to cancel the latter part of the letter dated 9th July, 1892, and to replace the same by the words "The firm of Messrs. D. J. M. & Co. should, so long as it stands, have all the rights of the existing Agency whether managed by partners or by Mr. D. J. M's sons," and followed this up by another letter suggesting the names of three persons who might be admitted as partners of D. J. M. & Co., in the life insurance business and recognised as such by the company.

On the 13th of March, 1899, the manager of the respondents replied stating that the company had pleasure in agreeing to cancel that part of the letter and added "from this date we therefore acknowledge the following as our agents working under the title of D. J. M. & Co. . . . . It is of course understood that the agency hold themselves bound by the conditions of agents institution so far as they have not been altered by letter and that arrangements or conditions with the exception of this concession remain as before."

D. J. M. died in 1899. By 1917 one of the two other agents had retired, and the other had died and in April of that year, D.J. M.'s widow asked the respondents to recognise the appellants, who were the sons of herself and the said D. J. M. as the respondents' agents.

On the 19th of April, 1917 the manager of the respondents wrote as follows: "I have to advise you that at yesterday's Board Meeting sanction was given to these two sons coming into the firm as partners in connection with our Agency."

The employment of the appellants was terminated by the respondents by a letter dated 14th September, 1939, from the manager stating: "I am instructed by the Board of Directors to advise you that they have with regret resolved . . . . to terminate your Chief Agency as from 1st January, next."

---

* P. C. A. No. 37 of 1944. 10th October, 1945.

The appellants were licensed as "insurance agents" on 1st January, 1940.

In a suit by the appellants as plaintiffs claiming damages as against the respondents for breach of contract it was contended that the contract was one for life and not terminable on notice; if it was terminable on notice, the notice given was not reasonable and that either under the contract or under the provisions of the Insurance Act they were entitled to commissions on renewal premiums even after the termination of the contract of agency.

Held:

Though there was some force in the contention that the original appointment was for the lifetime of D. J. M. if he so long continued in business, and that it could not be determined by notice, it cannot be said that the appointment of the subsequent agents was for the lifetime of the agents. In the absence of any reference in the correspondence to the duration of the agency of the appellants the agency was to be held as one terminable by reasonable notice. The notice of 3½ months given by the respondents was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expense incurred by the agents.

Prima facie the right of an agent to commission ceases on the termination of his employment except in cases in which the whole of the work necessary to earn the commission has been done by the agent before his employment ceases. In the circumstances of the case, as a good deal of work had to be done by the agents to prevent policies from lapsing, the commission on renewal premiums was not payable to the appellants under the terms of their contract after its termination.

It could not be said that the appellants came within the description of a "person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents" in section 40 (1) of the Indian Insurance Act. The appellants were individuals who received payment by way of commission in consideration of their soliciting or procuring insurance business and, subject to the question of their being licensed under section 42 they come within the definition of "insurance agents" in section 2 (10). There is no reason for thinking that the two classes enumerated in section 40 (1) are mutually exclusive.

The notice of the 14th of September, 1939, terminated the employment of the appellants as and from the beginning of the 1st January, 1940, with the result that the appellants never became insurance agents within the definition of the Act.

The termination of the agency was clearly a breach of the contract on the part of the respondents and, if such breach has prevented the appellants obtaining the advantages which they would otherwise have derived under section 44 of the Act, they were entitled to damages on that account.

The fact that a full time agent has with the consent of the employer done a small amount of outside business of a character not engaged in by the employer is not sufficient to deprive him of the advantages conferred by section 44.

Section 44 confers a right on an insurance agent which takes effect on the termination of his appointment, and f at that time the agent is an insurance agent, he comes within the section although at the time of his original employment he was not an insurance agency.

But for the wrongful termination of the appellants' contract they would have been entitled to the benefits conferred on an insurance agent by section 44.

The nature of those benefits indicated.

F. A. Sellers, K. C. and *D. A. Scott Cairns* for the Appellants.

D. N. Pritt, K. C., Strangman, K.C. and *R. J. T. Gibson* for the Respondents.

CONCISE STATEMENT OF FACTS.

This is an appeal from a judgment and decree of the High Court of Judicature at Bombay, in its appellate jurisdiction, dated the 18th November, 1943, affirming a decree of that Court passed in its ordinary original Civil Jurisdiction on the 14th of April, 1943.

The Respondents are a life assurance company, carrying on Insurance business all over India and elsewhere.

The present appeal arises out of the termination by the Respondent of the Appellants' appointment as their chief agents for Gujerat and Kathiawar. The Appellants are the present partners in the firm of D. J. Medora & Co., which was originally founded by their father. The contract between the parties was contained in certain letters, and the relevant letters are fully set out in the judgment of their Lordships.

The main questions for decision are:

(*i*) Whether a contract under which the Appellants were employed as agents for the Respondents, was terminable by the Respondents by giving reasonable notice or not.

(*ii*) If the said contract was terminable, whether two years was a reasonable notice.

(*iii*) Whether under the said contract the Appellants were entitled to certain commissions after the termination of their appointment.

(*iv*) Whether the Appellants were entitled to retain and cash a certain sum of money.

(*v*) Whether the Appellants were insurance agents within the meaning of the Insurance Act of 1938, and were under the provisions of that Act, entitled to the said commission after termination of their appointment.

ARGUMENT:

F. A. Sellers, K. C. and D. A. Scott Cairns, for the Appellants.—Sellers: As to the duration of the contract, was it for the lifetime of appellants or the survivor of them or for a lesser time? It was a contract of personal service. What was the intention of the parties? It is unthinkable that the

father D. J. Medora, would have ever started if he had known that his agency could be terminated at two years notice. Both parties had agreed that the duration was for the lifetime of D. J. Medora (father). Assuming that the contract was for his life then the further contracts were also for the duration of the lives of the three partners appointed at a later date.

I submit we were entitled to commission, both under the contract, and under the statute.

We were licensed agents within the meaning of the Insurance Act at all material times. The relevant sections are 40 to 44, the important one for us is section 44.

Our employment was terminated on the 14th September, 1939, and was to take effect as from the 1st January, 1940. We became licensed on the 1st January, 1940; accordingly for the last day of our employment we were insurance agents licensed under the Act. This is supported by *South Stafford Tramways Co., Ltd.* v. *The Sickness and Accident Assurance Association Ltd.*, (1891) 1 Q.B.D. 402.

We are also entitled to commission on the renewal premiums after the termination of the contract, under section 44 of the Insurance Act.

Refers to *Bunyon* on Law of Life Insurance p. 4, 30 T. L. R. 134, *Bowstead* on Agency, Article 65.

Scott Cairns for the appellant followed.—I refer your Lordships to letter II at p. 56 of the Record. This letter can be used to support an implied term in the contract, that we were entitled to commission on renewal premiums.

D. N. Pritt, K.C., T. J. Strangman, K.C. and R. J. T. Gibson, for the Respondents : D. N. Pritt.—The President of the Board asked the learned Counsel to confine his argument to the applicability of the Insurance Act.)

D. N. Pritt.—The burden rests on the appellant under section 44 to show that for the last ten years they served the Respondents exclusively ; that is an essential under the proviso to section 44. Failure to do so takes the appellants out of the provisions of section 44 altogether : there is no evidence to show that the appellant served the respondent exclusively.

My other submission is that section 44 should not be applied retrospectively, therefore it canno affect the agreement made in 1917.

It is plain from the evidence that the appellants were employing about 400 sub-agents: they were not insurance agents within the meaning of section 44: they come under the words of section 40 (1), namely, "or a person acting on behalf of an insurer who for the purpose of insurance business employs insurance agents."

T. J. Strangman followed.

F. A. Sellers replied for the appellants.—As to the word exclusively, in the proviso to section 44, the evidence does show that the appellants did a certain amount of fire insurance, but in my submission that does not take them out of the provisions of section 44: fire insurance does not compete with life: in any case this point was never taken below.

On pages 85 and 87 of the Record, the Respondents address us as Chief Agents, and not as the firm of D. J. Medora.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a decree dated 18th November, 1943, made by the High Court of Judicature at Bombay[1] in its appellate jurisdiction affirming a decree dated 14th April, 1943, of the same Court passed in its ordinary original civil jurisdiction. In the suit the appellants who were plaintiffs claimed damages against the respondents for breach of contract. Both Courts in India held that the contract between the parties was terminable by the respondent on reasonable notice and that in the circumstances of the case two years' notice was a reasonable notice and accordingly that the notice of 3 1/2 months by which the respondents had purported to terminate the agreement was not reasonable ; and damages were awarded to the plaintiffs on that basis. On a counter-claim judgment was given for the respondents.

Before their Lordships' Board the appellants have raised five questions :

(1) Whether the contract under which the appellants were employed as agents for the respondents was terminable by the respondents on giving reasonable notice. The appellants maintain that it was not so terminable.

(2) If the said contract was terminable by reasonable notice, whether two years was a reasonable notice, the appellants maintaining that the notice should be a three years' notice.

(3) Whether under the terms of the said contract the appellants were entitled to commission on renewal premiums on life policies effected through their agency after the termination of their appointment.

---

1. (1943) 46 Bom. L.R. 279.

(4) Whether the appellants were entitled to commission on renewal premiums under the provisions of the Insurance Act (Act IV of 1938) after the termination of their appointment.

(5) Whether the appellants were entitled to retain and cash a cheque for Rs. 75,000 sent to them by the respondents with a request that they should sign and return a certain form of receipt, although they did not sign or return the said form of receipt.

This last question was raised by the counter-claim, and their Lordships may say at once that they agree with the views of the High Court that the appellants could not retain the sum of Rs. 75,000 without complying with the conditions on which it was sent. This question was not seriously argued, and their Lordships need say no more about it. The amount will be set off against any damages due to the plaintiffs.

The contract between the parties was contained in certain letters which passed between them or their predecessors in the years 1892, 1899, and 1917.

In the year 1892 the respondents who were then, and still are, a company registered in Bombay under the Indian Companies Act carrying on business of life insurance, were minded to appoint one D. J. Medora, the father of the present appellants, who carried on business in the name of D. J. Medora & Co. as agent of the respondents for the district of Gujarat. There is no dispute about the area covered by the agency from time to time, but it may be noticed that such area was subsequently extended to embrace Kathiawar and Cutch, so that the area was extensive and could only be worked by the employment of a large number of sub-agents and canvassers. After considerable correspondence terms were agreed, and the only terms which are in question in this appeal are as to the duration of the agency, and the right to commission on renewal premiums after the termination of the agency. On these two points two letters comprised in the 1892 series are material. On the 6th July, 1892, D. J. Medora wrote to the respondents agreeing to accept the agency, though regretting that the terms were not more generous, but stating that his acceptance was subject to a clear understanding on two points the second of which was

"(2) that the premium of persons assured through my agency should be always subject to my commission so long as they remained within the province of Gujerat whether the premium be remitted through my offices or direct."

The manager of the respondents replied to that letter on the 9th July, in the following terms so far as material:

"With reference to the two conditions you now mention I see from our letter of the 18th ultimo that the first has been already disposed of. As the second goes further than was contemplated in ours of the 18th ultimo I would add that we have no objection to agree to it as now put.

I accordingly have pleasure in formally appointing you Chief Agent for Gujerat. The Agency would stand in the name of D. J. Medora & Co. but as already explained you alone would be our recognised agents and would be solely responsible. On your retiring or otherwise discontinuing the work the agency would cease and your partner would have absolutely no claim thereunder."

On the 9th February, 1899, D. J. Medora wrote to the respondents a letter containing the following passages:

"While going through the old papers of the terms of our Agency we came across a passage, a copy of which is herewith attached, and it startled us immensely. Up to now we had no idea of such a passage and when we now try to think over it we find it very discouraging and is likely to keep us back from sacrificing our money every year for furthering the business of the Company for, it appears that any day our pains and expenses would come to nothing . . .

Mr. D. J. Medora is, although his name is connected with the Agency, already from our standpoint, a retired member of the firm so far as the Oriental Life Business is concerned, which is managed by other members. That under such circumstances the other members of the firm or his sons (now minors) should be deprived of the advantage expected to be derived from the sacrifice of our money and from the pains now taken for increasing the business is a serious anomaly.

We beg therefore the favour of your being so kind as to cancel the paragraph above referred to and to replace the same by the words 'The firm of Messrs D. J. Medora & Co. should, so long as it stands, have all the rights of the existing Agency whether managed by partners or by Mr. D. J. Medora's sons'."

It is admitted by Counsel both for the appellants and the respondents that the passage a copy of which was said to be attached to the last mentioned letter, was the passage already quoted from the letter of the 9th July, 1892, saying that the agency would cease on D. J. Medora retiring or otherwise discontinuing the work, and that his partners would have no interest.

In a further letter dated 7th March, 1899, D. J. Medora suggested to the respondents that the following men might be admitted as partners for D. J. Medora in their Life Assurance business and recognised as such by the Company:

(1) Mr. Dhunjibhoy Jamsetji Medora,
(2) Mr. Cawasji Hirjibhoy Medora,
(3) Mr. Phirozshaw Dhunjibhoy Medora.

On the 13th March, 1899, the manager of the respondents replied to these letters stating that the respondents had pleasure in agreeing to cancel the passage in the letter of appointment to which Mr. Medora objected and they went on to state:

"From this date we therefore acknowledge the following as our agents working under the title of D. J. Medora & Co.:

Mr. Dhunjibhoy Jamsetji Medora.
Mr. Cowasji Hirjibhai Medora.
Mr. Pherozeshaw Dhunjibhai Medora.

It is of course understood that the agency hold themselves bound by the conditions of our agents institution so far as they have not been altered by letter and that arrangements or conditions with the exception of this concession remain as before."

D. J. Medora died in the year 1899. By 1917 one of the two other agents had retired, and the other had died, and in April of that year D. J. Medora's widow asked the respondents to recognise the appellants, who were the sons of herself and the said D. J. Medora and were then aged respectively 24 and 21, as the respondents' agents.

On the 19th April, 1917, the manager of the respondents wrote a letter in the following terms so far as material:

"I duly received a letter of the 16th instant signed by Mrs. Kharshedbai D. Medora intimating it was desired that Mr. Sorabjee Dhunjibhoy Medora and Mr. Jamshedjee Dhunjibhoy Medora should be acknowledged as partners in the firm of D. J. Medora & Co., and I have to advise you that at yesterday's Board Meeting sanction was given to these two sons coming into the firm as partners in connection with our Agency. It is understood that both will give their full time to the Agency doing all in their power to keep up to past records and that they will make every endeavour to increase the business by opening fresh connections throughout every part of the large district under the Agency control."

On the question as to the duration of the agency, Mr. Sellers for the appellants contends that in 1892 when the agency started it was clear to the parties, as the correspondence shows that the building up of the agency business would involve the expenditure of much time and money by the agent, and that it cannot be supposed that D. J. Medora would have agreed to his agency being terminable by notice, so as to enable the respondents at any time to appropriate the goodwill of the business which he had built up. He contends that the letter of the 9th July, 1892, shows that the appointment of D. J. Medora was for his life or so long as he continued in business, and that a corresponding term must be deemed to have been imported into the appointment of subsequent agents. Their Lordships think there is some force in the contention that the original appointment was to last for the life-time of D. J. Medora if he so long continued in business, and that it could not have been determined by notice, but they are quite unable to accept the view that the appointment of subsequent agents was for the life-time of those agents. It will be noticed that the respondents' letter of the 13th March, 1899, cancelled the passage in the letter of the 9th July, 1892, under which D. J. Medora might have claimed an agency for his life-time, and nothing whatever was said in the letter of the 13th March, 1899, about the duration of the new agency, the suggestion of D. J. Medora that it should last so long as the firm of D. J. Medora & Co. stood being ignored. Nor was anything said about the duration of the agency when the appellants were appointed agents on the 19th April, 1917. As

already noticed the appellants then were young men and to have extended the period of the agency for their lives and the life of the survivor would have been a very different matter from extending the original appointment of D. J. Medora for his life. In the absence of any reference in the correspondence to the duration of the agency of the appellants their Lordships agree with the Courts in India in thinking that the agency was terminable by reasonable notice.

On the question as to what notice was reasonable, if their Lordships had agreed with the High Court upon the other questions at issue, they would have accepted without question the concurrent findings of fact that two years was a reasonable notice; nor must their Lordships be taken as dissenting from that view. But as the case will have to be remitted to the High Court for the assessment of damages on the basis that the appellants have certain rights in relation to commission on renewal premiums after the termination of their contract, their Lordships think that the High Court should be free to reconsider the question of length of notice. The only opinion on the matter which their Lordships feel called upon to express is that the notice of 3½ months given by the respondents was inadequate to determine an agency which had lasted for nearly 50 years, under which a very large business had been built up, and great expense incurred by the agents.

Upon the third question raised as to the right of the agents to commission on renewal premiums under the terms of the contract after its termination the appellants rely on the passage in the letter of the 6th July, 1892, which was accepted by the respondents that

> "the premiums of persons assured through my agency should be always subject to my commission so long as they remained within the Province of Gujerat whether the premium be remitted through my offices or direct"

as entitling the agents to commission on renewal premiums so long as the policies were extant whether the agency continued or not. On this contention their Lordships agree with the views of the learned Judges of the High Court that the word "always" in the passage quoted is not used in the sense of "for all time" but in the sense of "in all conditions," a meaning which the word often bears. The passage only means that commission should be payable so long as the policy holder remained within the Province of Gujerat, although the premium might be remitted direct and not through the agents. *Prima facie*, as the Courts in India have held, the right of an agent to commission ceases on the termination of his employment, except in cases in which the whole of the work necessary to earn the commission has been done by the agent before his employment ceases. It is clear from the evidence of appellant 2 that a good deal of work had to be done by the agents to prevent policies from lapsing, and that the payment of renewal premiums did not follow automatically from the original issue of the policy. Their Lordships therefore agree with the view of the Bombay High Court that commission on renewal premiums is not payable to the appellants under the terms of their contract after its termination.

That leaves for consideration the question whether the appellants can claim commission on renewal premiums after the termination of the contract under the Indian Insurance Act of 1938 which came into force on the 1st July, 1939. The material provisions of that Act as modified up to the 28th July, 1941, are the following:

Section 2. "In this Act, unless there is anything repugnant in the subject or context,—

* * * * * * * *

(8) "insurance company" means any insurer being a company, association or partnership which may be wound up under the Indian Companies Act, 1913, or to which the Indian Partnership Act, 1932, applies;

[(9) "insurer" is defined in terms which include the respondents but is expressed not to include an insurance agent licensed under section 42 or a provident society (as defined in Part III)]

(10) "insurance agent" means an insurance agent licensed under section 42 being an individual who receives or agrees to receive payment by way of commission or other remuneration in consideration of his soliciting or procuring insurance business.

Section 40. (1) No person shall, after the expiry of six months from the commencement of this Act, pay or contract to pay any remuneration or reward whether by way of commission or otherwise

for soliciting or procuring insurance business in India to any person except an insurance agent . . . or a person acting on behalf of an insurer who for the purposes of insurance business employs . . . insurance agents.

(2) No insurance agent . . . . shall be paid or contract to be paid by way of commission or as remuneration in any form an amount exceeding, in the case of life assurance business, forty per cent. of the first year's premium payable on any policy or policies effected through him and five per cent. of a renewal premium, or, in the case of business of any other class, fifteen per cent. of the premium:

Provided that insurers, in respect of life assurance business only, may pay, during the first ten years of their business, to their insurance agents fifty-five per cent. of the first year's premium payable on any policy or policies effected through them and six per cent. of the renewal premiums.

(3) Nothing in this section shall prevent the payment under any contract existing prior to the 27th day of January, 1937, of gratuities or renewal commission to any person, whether an insurance agent within the meaning of this Act or not, or to his representatives after his decease in respect of insurance business effected through him before the said date."

(Section 42 deals with the licensing of insurance agents.)

(Section 43 requires a register of insurance agents to be kept and imposes a penalty on an individual not holding a licence who acts as an insurance agent, and on a person employing such an individual.)

"Section 44. Notwithstanding anything to the contrary in a contract between any person and an insurance agent . . . . forfeiting or stopping payment of renewal commission to such insurance agent, no such person shall in respect of life insurance business done in India refuse payment to an insurance agent, of commission on renewal premiums due to him under the agreement by reason only of the termination of his agreement except for fraud:

Provided that such agent has served such person continually and exclusively for at least ten years, and provided further that, after his ceasing to act as agent, he does not directly or indirectly solicit or procure insurance business for any other person."

Both the Courts in India held that the appellants were not insurance agents within the meaning of the Act, and, on that view, no further question under the Act arose. Both the Courts took the view that the appellants came within the description of a "person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents" in section 40 (1) and that they could not also be insurance agents. Their Lordships are not in agreement with that view. The appellants are individuals who received payment by way of commission in consideration of their soliciting or procuring insurance business and, subject to the question of their being licensed under section 42, they clearly come within the definition of insurance agents in section 2 (10).

Section 40, sub-section 1, forbids the payment of commission for soliciting or procuring insurance business in India to any person except (1) an insurance agent; (2) a person acting on behalf of an insurer who for the purposes of insurance business employs insurance agents. Sub-section 2 limits the amount of commission which may be paid to an insurance agent, but does not restrict the amount which may be paid to the other class of persons entitled to commission under section 40 (1). Their Lordships see no reason for thinking that the two classes enumerated in section 40 (1) are mutually exclusive. If an agent falls within the definition of an insurance agent he cannot receive commission or remuneration in excess of the rate allowed whether or not he falls within the other class. All insurance agents who are appointed directly with power to employ sub-agents who are themselves insurance agents would fall within the second class in section 40 (1) and to hold that such direct agents are not insurance agents would open the door to extensive evasion of the restrictions on the amount of commissions payable under section 40 (2). The language of the section gives no scope for such a construction. In their Lordships' view the appellants were insurance agents provided they were duly licensed during the currency of their employment under section 42, and this question must now be considered.

The employment of the appellants was terminated by the respondents by a letter dated 14th September, 1939, from the manager stating:

"I am instructed by the Board of Directors to advise you that they have with regret resolved as a matter of uniform policy to terminate your Chief Agency as from 1st January, next."

The appellants were licensed as insurance agents on the 1st January, 1940. It is argued by the appellants that the termination of their agency as from the 1st January

1940, meant that it terminated as from the expiration of the 1st January, and that accordingly, for the last day of their employment, they were licensed insurance agents. Reliance was placed on *South Stafford Tramways Co., Ltd.* v. *The Sickness and Accident Assurance Association, Limited*,[1] to support this view. In that case an insurance policy cover extended for 12 calendar months from 24th November, 1887, and it was held that the policy covered the 24th November, 1888. Their Lordships would observe that a period limited as from a particular date is more appropriate to the commencement, than to the termination, of a period. In their Lordships' view no fixed rule of construction can be laid down that the termination of a contract as from a particular day means from the end, rather than from the beginning of the day, and the question must always depend to a large extent on the circumstances of the case. In the present case the day stated was the first day of a new calendar year and it would seem probable from the particulars delivered with the written statement, Exhibit No. 3, that the financial year of the respondents ended on the 31st December, 1939. It would certainly seem remarkable that the agency of the plaintiffs should have continued for one day in a new financial year. Their Lordships have no doubt that the notice of the 14th September, 1939, terminated the employment of the appellants as from the beginning of the 1st January, 1940, and it is clear from the correspondence that the appellant so understood the notice. In their Lordships' view therefore the appellants never became insurance agents within the definition in the Act, but that does not dispose of their claims under the Act. The termination of the agency by the letter of 14th September, 1939, was clearly a breach of contract on the part of the respondents and, if such breach has prevented the appellants obtaining the advantages which they would otherwise have derived under section 44 of the Act, they are entitled to damages on that account.

Mr. Pritt for the respondents has argued that section 44 in any case does not apply to the appellants because they do not qualify under the proviso. Under the first part of the proviso the agent must have served continually and exclusively for at least ten years, and Mr. Pritt points out that in the evidence of appellant No. 2 he stated that his firm's main business was the business of the agency in suit and then he added " we also do a little fire insurance business with the knowledge of the defendants." There appears to have been no cross-examination on this passage in the evidence, and the question as to whether the appellants would fall within the proviso to section 44 is not discussed in the judgments of the Courts in India. The appointment of the plaintiffs under the letter of the 19th April, 1917, was a full-time appointment, and their Lordships think that the fact that a full-time agent has with the consent of the employer done a small amount of outside business of a character not engaged in by the employer is not sufficient to deprive him of the advantages conferred by section 44. A second objection taken by Mr. Pritt to the applicability of section 44 is that it refers in the opening words to a contract between any person and an insurance agent, and, as an insurance agent is a creation of the Statute, Mr. Pritt argued that the section cannot apply to any contract made before the Act came into operation. The section is not well-drafted but their Lordships do not think that this is its effect. It confers a right on an insurance agent which takes effect on the termination of his appointment, and their Lordships think that if at that time the agent is an insurance agent he comes within the section although at the time of his original employment he was not an insurance agency.

Their Lordships therefore feel no doubt that but for the wrongful termination of the appellants' contract they would have been entitled to the benefits conferred on an insurance agent by section 44, and it is necessary to consider the nature of those benefits. The section provides that notwithstanding anything to the contrary in the contract employing the agent the employer shall in respect of life insurance business done in India not be entitled to refuse payment to an insurance agent of

1. (1891) 1 Q.B.D. 402.

commission on renewal premiums due to him under the agreement by reason only of the termination of the agreement except for fraud. In their Lordships' view, if the agreement of the appellants had not been terminated they would have been entitled under their agreement to commission on renewal premiums on all policies effected through their agency, so long as the policies remained in force, and the policy holder continued within the Province of Gujerat, subject to possible determination under the second part of the proviso to section 44. In their Lordships' view the appellants are entitled to damages for loss of these rights. In assessing the damages the rate of commission should be 5 per cent. which is less than the contract rate but the maximum allowed by the Act, unless in any case a higher rate can be claimed under section 40 (3). Any claims of sub-agents are outside the present suit. Some allowance must be made under the second part of the proviso for the possibility that the appellants may in the future solicit or procure insurance business for some other person. It is obvious that the damages will have to be entirely reassessed as the general damages allowed for breach of contract will be reduced by the amount allowed for loss under the Act, and, as already indicated, the Judge will be free to reconsider what is a reasonable notice.

Their Lordships will humbly advise His Majesty that this appeal be allowed and that the decree of the High Court in its appellate jurisdiction dated 18th November, 1943, be set aside and that the decree of the High Court in its original jurisdiction dated 14th April, 1943, be set aside except so far as it deals with the counterclaim of the defendants and with the costs of the suit but that the order as to costs be varied by including the costs of issue 12 in the general costs of the suit; and that the suit be remanded to the High Court of Judicature at Bombay with directions to assess the damages suffered by the appellants by the wrongful determination of their contract of agency referred to in the plaint by the respondents and to pass judgment for such damages, the costs of the further hearing to be in the discretion of the said Court. The respondents shall pay half the costs of the appellants of this appeal to His Majesty and of the appeal to the High Court in its appellate jurisdiction.

Solicitors for Appellants: *Gregory Rowcliffe & Co.*

Solicitors for Respondents: *Latty & Dawe.*

H.J.U./V.S. — *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Appavu *alias* Lakshmanan Pillai and another .. *Appellants**

v.

Manickam Pillai and others .. *Respondents.*

Hindu Law—Joint family—Agreement for management of the family affairs and division of the income of agricultural lands—If sufficient to indicate a severance in status—Earlier division of moveables and outstandings—Effect.

The partition of some of the joint assets does not of itself imply a division in status. In deciding whether a joint family has become divided the Court must naturally have regard to the terms of any instrument bearing on the question and if the wording is ambiguous to the subsequent conduct of the parties. The division of the income of the agricultural lands may not in itself be sufficient to evidence a division in status. Nor is the division of the outstandings and other moveable property a clear indication of a division in status. The fact that the family owned a considerable amount of immoveable property and left that completely undivided is a strong indication that the members did not intend to effect a severance especially when they agree that two of the brothers were to have charge of the future management of the affairs of the family and that no brother could independently borrow money for a family necessity.

Appeal against the decree of the Court of the Subordinate Judge, South Malabar, at Calicut, in O. S. No. 44 of 1943 (O. S. No. 27 of 1942, Sub-Court, Palghat).

C. K. Viswanatha Aiyar for Appellants.

K. V. Ramachandra Aiyar, S. Tyagaraja Aiyar and *D. A. Krishna Variar* for Respondents.

---

* Appeal No. 169 of 1944. 28th August, 1945.

The Judgment of the Court was delivered by

The Chief Justice.—This appeal arises out of a suit for partition instituted in the Court of the Subordinate Judge of South Malabar. It has been filed by the first and the second defendants. The point raised by them is a very simple one. The plaintiff has filed a memorandum of cross-objections which challenges the correctness of the interpretation of an agreement entered into between the members of the joint family on the 30th September, 1925. The question here is not quite so simple.

The joint family was composed of three brothers, Kasturi Pillai, Sevanthan Pillai and Appavu Pillai. Kasturi died on the 6th October, 1925, and Sevanthan on the 19th May, 1930. The plaintiff is the son of Kasturi. There were five defendants: Appavu, his three sons and the widow of Sevanthan. The plaintiff averred that he was entitled to a half share of the family estate as the family had throughout remained joint and there were only two surviving coparceners namely himself and his uncle Appavu. The defendants averred that the agreement of the 30th September, 1925, effected a division of status and a partition of the family estate. On this basis the plaintiff could only have a one-third interest in the estate. The first defendant alleged that Sevanthan had made an oral will by which he left his entire share to him. The learned Subordinate Judge held that Sevanthan had made no will, but he accepted the defendant's contention that the agreement of the 30th September, 1925, had in fact effected a division of status. The first defendant does not challenge the finding of the Subordinate Judge that Sevanthan died intestate. He merely complains that the Subordinate Judge erred in holding him liable for a sum of Rs. 2,039-12-4. The plaintiff makes no complaint of the Subordinate Judge's judgment, except in so far as it decided that the agreement of the 30th September, 1925, resulted in a division of status and a partition of the property.

The question with regard to the Rs. 2,039-12-4 arises in these circumstances. Kasturi was a subscriber to a *Kuri*, or chit fund, and as a subscriber he became entitled to receive from the stakeholder Rs. 6,639-12-4. He was very ill at the time and not in a position to look after his affairs. Admittedly the stakeholder paid out the full sum of Rs. 6,639-12-4 and the plaintiff says that all the money was received by the first defendant, who is consequently liable to account to him for it. The first defendant admits that he received Rs. 4,600 of the Rs. 6,639-12-4, but he denies that he ever received the balance of Rs. 2,039-12-4.

The Subordinate Judge has dealt with this question in paragraphs 27 and 28 of his judgment and we agree with him that the first defendant must be held liable to account for the Rs. 2,039-12-4. Kasturi was very ill when the stakeholder paid out the money. In fact, he died 6 days later. The first defendant was in charge of the affairs of the family and it is not suggested that the stakeholder paid any of the money to Sevanthan. As Kasturi was dying it is most unlikely that any of the money would be paid out to him. The only person to whom the money could have been paid was the first defendant. It may be mentioned that the three brothers executed a mortgage in favour of the stakeholder to secure Kasturi's liability to the chit fund; and there can be no doubt that the execution of this mortgage was arranged by the first defendant. All the indications are in favour of the plaintiff's case that the first defendant received the whole of the money. Therefore the appeal must be dismissed with costs in favour of the plaintiff.

We now turn to the plaintiff's memorandum of cross-objections. It is common ground that in 1925, the three brothers were living in separate houses. Kasturi and his family lived at Erode. Sevanthan and the first defendant lived at Kollangode which is near Palghat. Kasturi had lived at Erode for many years. It is also common ground that, notwithstanding that the brothers had lived and messed separately, the family was joint both in status and property, up to the 30th September, 1925. On the 23rd March, 1910, the brothers entered into an agreement for the management of the estate. This agreement was exhibited in the trial

Court, but does not form part of the record in this Court. It is, however, accepted by all parties that it merely arranged for the management of the estate and did not affect the joint status. The agreement entered into on the 30th September, 1925, was necessitated by the fact that Kasturi was very ill and provision had to be made for his maintenance and that of his family. The deed indicates that the brothers had previously divided between themselves the moveable properties of the family apart from the debts due to the estate. It provides that each brother was to have a third of the income from the agricultural lands belonging to the family and pay a third of the revenue due to Government in respect of these lands. Each brother was to have a third of the interest earned on money lent out by the family and a third share in the principal amounts. The deed contains no provision for the division of the immoveable property. As Kasturi was so ill it provided that the management of the family affairs should vest in Sevanthan and the first defendant. Sevanthan does not appear to have taken any part in the management which at all material times was in the hands of the first defendant alone. The Subordinate Judge held that this document amounted to an agreement for partition because of the splitting up of the income into three shares, the division of moveable properties between the brothers and the provisions with regard to loans granted by the family and interest thereon. If the Court had not got to look beyond these matters, there would be much to say for the Subordinate Judge's decision; but there are other provisions in the deed and when the document is read as a whole in the light of the authorities we consider that the Subordinate Judge erred in holding that it amounted to a deed of partition.

The document opens with this recital:

"Although we formerly executed a *karar* (agreement) and registered it as document No. 427 of 1910 in the office of the Sub-Registrar of Kollangode, and have been conducting ourselves in accordance with the terms of the said *karar* up till now, yet, since the trend of the times and the status of the family have undergone a change of aspect, and it has become mutually inconvenient under existing conditions to act in accordance with the terms of the previous *karar* we have settled, notwithstanding the provisions contained in the prior *karar* and in conformity to circumstances now prevailing to conduct ourselves in future in the manner stated herein below, and it has therefore become necessary to indite this *karar* in accordance with that settlement. If we act in accordance with the provisions of this *karar* it will bring us welfare and be the foundation of our future prosperity."

Clause (4) of the agreement provides that Sevanthan and the first defendant should "in future manage the affairs of the family and cause them to be managed." The agreement is described at the beginning of the document as "Kutumba natavati Karar", which means an agreement for the management of the family affairs. The total yield of the family property was 1,500 paras of paddy. Clause 5 of the agreement gives clear indication that each brother was to have 500 paras of paddy towards the food and other expenses of the members of his household. Clause 11 is also of importance. It contains this statement:

"It is also settled that, if in future, it becomes necessary to borrow any sums for our family necessity, the said sums shall only be borrowed by all three of us jointly and shall not be borrowed by any one of us individually; that, however, if any one of us does borrow any amounts, the remaining members and the properties belonging to the family shall not be liable for the said debts, and that only the borrower and his share of the properties shall be answerable for the same."

The fact that the members of a joint family divide among themselves some of the family assets does not in itself mean a division in status. The learned advocate for the fifth defendant boldly asserted that this would be the effect; but when the authorities are read this assertion is clearly fallacious. The law is summarised in the following passages in Mayne (10th edition):

"Partition is a new *status*, and when it is brought about by consensus of the members of a coparcenary they must intend that their condition as coparceners shall cease. It is not sufficient that they should alter the mode of holding their property. They must alter, and intend to alter, their title to it. They must cease to be joint owners, and become separate owners. On the one hand, the mere cesser of commensality and joint ownership, the existence of separate transactions, the division of income, or the holding of land in separate portions, or a mere definition of shares in revenue and village papers, do not establish partition, unless such steps were taken with a view to carry out a partition. The question however is one of fact to be decided in the light of legal principles, as to the cumulative effect of all the circumstances" (page 556).

"Partition may be either total or partial. A partition may be partial either as regards the persons making it or the property divided.

It is open to the members of a joint family to sever in interest in respect of a part of the joint estate while retaining their status of a joint family and holding the rest as the properties of an undivided family" (page 567).

In his judgment in *Sudarsanam Maistri* v. *Narasimhalu Maistri*,[1] Bhashyam Ayyangar, J., said :

"So far as this Presidency is concerned, though there is no reported decision bearing directly on the point . . . . the principle generally recognised and acted upon is that though there can be no compulsory partial partition either in respect of the joint property belonging to the family, or in respect of the persons constituting the undivided family, yet by mutual agreement of parties the partition can be partial either in respect of the property or of the persons constituting the family."

In delivering the judgment of the Privy Council in *Ramalinga Annavi* v. *Narayana Annavi*,[2] Mr. Ameer Ali said :

"It will thus be seen that, under the Hindu Law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family."

Turner, L.J., delivered the judgment of the Board in *Sonatun Bysack* v. *Sreemutty Juggutsoondaree Dossee*,[3] and in doing so said :

"There has been no division at all of this family, unless the division of the income during the few years which followed upon the death of the testator up to a short period after the death of Hurrymohan Bysack constituted division of the family, and their Lordships are very clearly of opinion, that the mere division of income, for the convenience probably of the different members of the family, did not amount to the division of the family."

There is here ample authority for the statement that the partition of some of the joint assets does not of itself imply a division in status. In deciding whether a joint family has become divided the Court must naturally have regard to the terms of any instrument bearing on the question and if the wording is ambiguous to the subsequent conduct of the parties. The observations of their Lordships in *Maharaja Ram Kissen Singh* v. *Rajah Sheonundun Singh*[4] lend full support for this statement.

The division of the income of the agricultural lands is not in itself sufficient basis for the defendants' contention that there is in the agreement of the 30th September, 1925, clear indication of a division in status. The decision of the Privy Council in *Sonatun Bysack* v. *Sreemutty Juggutsoondaree Dossee*,[3] in itself provides a complete answer to this argument.

Now, does the fact that the brothers divided the outstandings and other moveable property make any difference? We consider that it does not. The moveable property had merely been divided for convenience, as had the allocation of income. The fact that the family owned considerable amount of immoveable property and left that completely undivided in itself proves strong indication that the agreement of the 30th September, 1925, was not intended to effect a severance. But there are further and even stronger indications in this direction, namely, in the fact that two of the brothers were to have charge of the future management of the affairs of the family, and in that no brother could borrow money for a family necessity without the other two joining in.

What does the subsequent conduct indicate? As we have shown, Kasturi died 6 days after the execution of the agreement and Sevanthan did not take any part in the management of the family affairs. When Sevanthan died in 1930 the first defendant, who had throughout been managing remained in management, and he remained in management until the filing of the suit. On the 15th August, 1927, a petition was addressed to the Collector of Malabar by the mother of the plaintiff as his guardian by Sevanthan and by the first defendant.

Paragraph 4 of this petition reads as follows :

"That the petitioners beg to state that in virtue of a family *karar* Appavu *alias* Lakshmana Pillai (the first defendant) is the present manager of the properties and they therefore request that any references or orders in connection with this petition may be sent to him."

1. (1901) 11 M.L.J. 353 : I.L.R. 25 Mad. 149 at 157.
2. (1922) 43 M.L.J. 428 : L.R. 49 I.A. 168 : I.L.R. 45 Mad. 489 (P.C.).
3. (1859) 8 M.I.A. 66 at 86.
4. (1875) 23 W.R. 412.

Does this not mean, that the first defendant was the kartha of the joint family? The learned counsel for the fifth defendant has stressed a statement made by the plaintiff's mother in another petition. Part of the family property had been acquired in land acquisition proceedings and in this connection money was lying in Court. The plaintiff's guardian applied that it be paid out to her on his behalf. She stated that the plaintiff's father Sevanthan and the first defendant were living divided in status. In *Venkatapathi Raju* v. *Venkatanarasimha Raju*,[1] the Judicial Committee had to consider the effect of a statement made by two brothers. Their Lordships pointed out that it sometimes happened that persons made statements which served their purpose or proceeded upon ignorance of the true position; and it was not their statements, but their relations with the estate, which should be taken into consideration in determining the issue. We have no doubt that the plaintiff's mother made the statement relied upon by the fifth defendant as she considered that by doing so she could more easily secure payment out to her of the money. We cannot regard it as of any importance, especially as in the petition to the Collector which was of an earlier date she subscribed to the averment that the first defendant was the manager of the family property.

We hold that the agreement of the 30th September, 1925, did not effect a division in status. In our judgment the arrangement was made in order to meet the situation created by the three brothers living in different places and the illness of Kasturi. If there had been any intention that the document should be read as a deed of partition, they certainly would not have described it as an agreement for the management of the family affairs, and nothing would have been easier for them to have worded it as a deed of partition. The wording is inconsistent with such a deed. For these reasons we allow the plaintiff's memorandum of cross-objections with costs against the appellants and defendants-respondents.

As the result of the allowing of the memorandum of cross-objections the fifth defendant has no interest in the estate beyond a right to be maintained out of it. The question of the amount has not been decided by the trial Court. The case will have to be remanded to the Subordinate Judge to hear and decide an issue with regard to the amount to be paid to the fifth defendant for her maintenance. The parties will be at liberty to adduce whatever further evidence they desire in this connection. The finding of the Subordinate Judge on this issue will be embodied in the final decree.

K.S. *Appeal dismissed and Memorandum of cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Thadavarthi Bapayya and others .. *Appellants**

v.

Myneni Pundarikakshayya .. *Respondent.*

*Hindu Law—Minor—*De facto *guardian—Sale of minor's property without any valuable consideration to support it—Setting aside of sale—Liability of alienee to account for mesne profits—Limits.*

No improper alienation by a *de facto* guardian is binding on the minor until it is set aside although it may be voidable in the sense that he may elect either to ratify it or avoid it by treating it as a nullity. It cannot be said that mesne profits could be allowed only from the date of the plaint wherein the ward first repudiated the transaction and not before. The test of void or voidable is not always decisive on the question of liability for mesne profits. Accordingly where a sale of the minor's property by a *de facto* guardian without any valuable consideration to support it is set aside at the instance of the minor on attaining majority the alienee is accountable for mesne profits from the date of the agreement for sale when possession was delivered to him. (Case-law discussed.)

Appeal against the decree of the District Court, Guntur, in A.S. Nos. 477 and 482 of 1942 preferred against the decree of the Court of the Subordinate Judge, Tenali, in O.S. Nos. 61 of 1940 and 1 of 1942 respectively.

---

1. (1936) 71 M.L.J. 558 : L.R. 63 I.A. 397 : I.L.R. (1937) Mad. 1 (P.C.).

* S. As. Nos. 1342 and 1343 of 1944. 12th September, 1945.

V. Govindarajachari and *B. V. Ramanarasu* for Appellants.

P. Satyanarayana Rao for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.—These two second appeals arise out of two connected suits tried by the Court of the Subordinate Judge, Tenali. As the parties were differently arrayed in the suits it will be convenient to refer to them according to their description in the cause-title of the main suit, O. S. No. 61 of 1940, which was brought for possession with mesne profits of certain lands of the plaintiff sold during his minority by his natural father acting as his guardian. The first defendant was the vendee and defendants 2 to 5 are his sons.

The plaintiff's adoptive father, Chelamayya Chowdari, carried on dealings with the first defendant a money lender, and for the amount due in respect of such dealings executed a promissory note (Ex. D-7) for Rs. 1,465-3-5 on 5th June, 1923. He died in January, 1925, leaving him surviving his widow Srikrishnamma, whom he had authorised to make an adoption, and she accordingly adopted her sister's son, the plaintiff, who was then a minor. On 16th April, 1925, she executed for herself and on behalf of her son as his guardian a promissory note for Rs. 4,540-6-8 in favour of the first defendant. The note (Ex. D-6) recited that a sum of Rs. 2,480-6-8 was due in respect of her husband's dealings including the principal and interest due under Ex. D-7 and the balance Rs. 2,060 was advanced in cash to her on that day. The total amount was to carry interest at 12 per cent. per annum. The purpose for which Rs. 2,060 was borrowed by her was not mentioned in the note. This note was renewed by her on 6th April, 1928, by the execution of another note, Ex. D-5, for Rs. 5,416-5-11 being the principal and interest due under the previous note Ex. D-6. Soon after, she died in June, 1928, and her sister's husband and natural father of the plaintiff, China Seshiah, assumed control and management of the plaintiff's properties and affairs and continued in such management until the plaintiff attained majority in December, 1937. On 21st September, 1928, he executed the note Ex. D-4, for Rs. 5,725-5-7 as guardian and natural father of the plaintiff in renewal of the previous note of Srikrishnamma, and Ex. D-4 was in turn renewed by Ex. D-3, dated 19th September, 1931, which was for a sum of Rs. 7,845-14-1 then found to be due.

As the debt had remained unpaid for a long time the first defendant began to press for payment and, as a result, the sale now impugned was arranged with a view to discharge the debt. An agreement was accordingly entered into on 24th October, 1933, between the first defendant and China Seshayya purporting to act as the guardian of the plaintiff, providing that the lands now in question, 9 acres 11 cents in extent, should be conveyed to the first defendant for Rs. 9,000 out of the sum of Rs. 9,883-3-0 found to be due that date, and for the balance Rs. 883-3-0 a promissory note should be given. Possession of the lands was delivered immediately in pursuance of the agreement, but the conveyance and the promissory note were executed on 17th August, 1934, the parties in the meanwhile having taken legal advice from a leading lawyer at Bapatla who settled the draft of the deed of conveyance. As this deed, marked as D-1, has been the subject of much argument before us, it is necessary to set out the relevant portions which have been officially translated as follows:

"Deed of sale of immoveable property for Rs. 9,000 . . . . Under the last promissory note, dated 19th September, 1931, minor Pundarikakshayya became indebted to you in a sum of Rs. 9,883-3-0 till 24th October, 1933, so you have been pressing us to discharge the said debt. Thereupon we met, with disputes myself contending to the effect that the amount of the principal and the interest due in regard to the amount borrowed in cash by Srikrishnamma Garu on behalf of the minor is not binding on the minor and yourself contending that the minor is liable to discharge the entire debt inasmuch as Srikrishnamma Garu borrowed the said amount in cash for effecting repairs to the lands of the minor and for the expenses of the family of the minor. In these circumstances as we thought that it is not fair to enter into litigation and put ourselves to expense and trouble, as the minor is not a very rich man and as the prices of lands have fallen on account of economic depression and in accordance with the advice of some mediators, yourself and myself on behalf of the minor have agreed as follows:—

(1) As the debt was contracted by the father and the minor is liable in all respects to discharge the debt of Rs. 4,776, the same should be fully credited by you.

(2) As regards the debts contracted by the mother on behalf of the minor, you should not compel the minor to the effect that he should discharge the same; as consideration herefor—.

(1) The land of the extent of 9 acres 11 cents belonging to the minor and described in the schedule, of the value of Rs. 3,644 according to the prevailing market value at the rate of Rs. 400 per acre, should be sold to you on 24th October, 1933, for a sum of Rs. 9,000 and the (said sale) consideration of Rs. 9,000 should be credited towards the promissory note, dated 19th September, 1931—having agreed as above the said land has been sold to you on behalf of the minor.

(2) The said land has been delivered possession of to you on 24th October, 1933, itself.

(3) The sum of Rs. 883-3-0 has been included in the promissory note executed this day in your favour on behalf of the minor.

All the terms of this document have been agreed to each in pursuance of the other. Therefore no one has any right whatever to separate the terms."

The plaintiff, besides denying everything connected with the impugned sale including his father's indebtedness, his mother's borrowing, his natural father's *de facto* guardianship and management of his properties, specifically alleged that the recitals in the sale deed as to disputes having been raised and settled by mediation in regard to the binding character of the borrowing by the plaintiff's mother and in regard to the value of the lands conveyed were "false and were invented in support of the sale deed dated 17th August, 1934." He also averred that his natural father China Seshayya was neither his legal nor natural guardian and that the promissory note executed by him in 1928 and 1931 were not valid and binding on the plaintiff. The defendants in their written statements pleaded, *inter alia*, that the various borrowings by the plaintiff's adoptive father and, after his death, by Srikrishnamma were true and binding on the plaintiff, that China Seshayya was fully competent as the *de facto* guardian of the plaintiff to execute renewals in respect of the pre-existing liability on behalf of the plaintiff and eventually to convey the properties in question in satisfaction of the binding debts and that the sale was therefore valid and binding on the plaintiff. They also pleaded that the recitals in the sale deed were true and that the transaction was valid as a settlement and adjustment of the disputed claims mentioned therein. The last mentioned plea was not specifically made the subject of an issue, but issue 4 which raised the question "whether the sale deed and the promissory notes executed by China Seshayya are true and supported by consideration and binding on the plaintiff," is in sufficiently wide terms to cover the plea.

The trial Court found that the debts said to have been incurred by the plaintiff's adoptive father were true and binding on the plaintiff, that the borrowing by his mother was mainly for repairing his lands and resulted in benefit to his estate and the plaintiff, having inherited her separate property was, in any case, bound by the debt, that China Seshayya was managing the plaintiff's estate efficiently and prudently as his *de facto* guardian and was competent to execute the promissory notes, Ex. D-4 and D-3, and that the sale deed Ex. D-1, having thus been executed for the discharge of debts binding on the plaintiff was valid and could not be questioned by him. The learned Judge also found, accepting the evidence of the third defendant, the sale was the result of a settlement of disputed claims as recited in the deed. He accordingly upheld the transaction and dismissed the plaintiff's suit. As a corollary from these findings the learned Judge decreed the connected suit which was brought to enforce the promissory note for Rs. 883-3-0 executed by China Seshayya on the same day as part of the transaction.

From this decision, the plaintiff preferred appeals to the District Court, Guntur. The learned District Judge, while agreeing with the trial Court as regards the binding character of the debt incurred by the father, the *de facto* guardianship of China Seshayya and his competency to renew the anterior obligation incurred by his father, held, differing from that Court, that the borrowing of Rs. 2,060 by the plaintiff's mother on the date of Ex. D-6 was not shown to have been made for any purpose such as would bind the plaintiff. He rejected as untrustworthy the evidence of the defendant's witnesses that the sum was borrowed for repairing

and reclaiming lands belonging to the plaintiff, and found that the recitals in the sale deed to that effect were most probably thought of only at that time, as it was felt necessary by the defendants to make out a case that the lending was for a binding purpose, no such purpose however having been mentioned either in Ex. D-6 or in its subsequent renewals. In this view, the Court held the sale to be binding on the plaintiff only to the extent of his father's debt which on the date of the agreement stood at Rs. 4,776 and not binding to the extent of Rs. 4,224 the balance of the consideration of Rs. 9,000 recited in the deed. That plaintiff's suggestion that this sum was the real consideration was accepted in preference to the defendant's case that the lands being worth not more than Rs. 400 per acre, the consideration was only Rs. 3,600 and odd. The Court accordingly set aside the decree of the trial Court and passed a decree directing the defendants 3 to 5 (to whose share the suit properties had been allotted at a partition in the family of the defendants) to pay to the plaintiff Rs. 4,224, with interest at six per cent. per annum, from date of plaint, on or before a specified date and, in default of such payment, to deliver possession of the suit properties to the plaintiff on the latter paying to them Rs. 4,776 with interest at the same rate from date of plaint till date of payment, with sundry directions as to costs. In the connected suit based on the promissory note, the appeal was allowed and the claim was rejected with costs. It is from these decrees that these second appeals have been brought. In S. A. No. 1342 of 1944, which arises out of the main suit, the plaintiff has preferred a memorandum of cross-objections, claiming that an unconditional decree for possession should be passed in his favour.

Since the filing of these appeals an important ruling has been given by a Full Bench of this Court in A. S. No. 81 of 1944 (*Pundarikakshayya* v. *Sreeramulu*[1]) which also arose out of a suit by the present plaintiff to set aside another alienation by China Seshayya to a third party in the course of his management as the *de facto* guardian of the plaintiff. There too the sale was for discharging debts incurred by the plaintiff's father, renewed by his mother and later renewed by China Seshayya, and it was effected within three years of the renewal by China Seshayya but beyond three years of the renewal by the mother. The Full Bench held that a *de facto* guardian has no power to bind a minor or his estate by his promissory note or acknowledgment of liability, and that the sale was therefore unsupported by consideration as the debts in discharge of which the sale was executed, though binding on the plaintiff, were barred and unenforceable at the time of the sale. Possession of the properties sold was accordingly decreed with mesne profits from the date of the sale. That decision applies here in full force as the facts are essentially similar and the plaintiff's suit must succeed.

It is however pointed out for the defendants, appellants, that the lower appellate Court has not determined the question as to whether the transaction could not be upheld as a *bona fide* settlement of disputed claims as recited in the sale deed and as spoken to by the third defendant in his evidence, and it is urged that we should either decide the question in exercise of our powers under section 103 of the Civil Procedure Code or remit the case for a finding by the lower appellate Court on the point. It is true that the learned District Judge has said nothing on this aspect of the matter presumably because it was not put forward before him. Para. 6 of his judgment where he sets out the points for determination in the appeals makes no reference to it. But the facts found by the learned Judge in regard to the binding character of the borrowing by the plaintiff's mother would seem to conclude this point against the appellants. As already stated, he has found that the defendant's assertion that she borrowed the sum of Rs. 2,060 for repairing and reclaiming certain unproductive lands of the plaintiff was not true and was an "after thought" which it was felt necessary to introduce in the sale deed, after consultation with the

---

1. Since reported in (1945) 2 M.L.J. 375 (F.B.).

lawyer who settled the draft, to make out a case that the borrowing was for a binding purpose. If this finding is accepted as it must be in these second appeals, in the absence of any suggestion that there was no evidence to support it, the defendant's plea that there was a *bona fide* dispute as to the purpose of the loan and that it was settled at the time of the agreement must fall to the ground. (*See* judgment in Appeal No. 204 of 1943.) It was said that the learned Judge expressed this opinion in considering another point in the case and that it should not be regarded as a finding of fact on the question whether the sale was not binding on the plaintiff as a *bona fide* settlement of disputed claims, which issue was not considered by the learned Judge. We cannot agree. A finding of fact by the lower appellate Court on a relevant issue must, in our opinion, be accepted as final even where such finding is material for the determination of a question which, though not raised in the Court below, is raised here.

The defendants next claimed that in any case the plaintiff should be directed to pay the defendants the sum of Rs. 4,776 being the principal and interest due on the date of the agreement of sale in respect of the debt incurred by the plaintiff's father which has been held to be binding on the plaintiff. This point is also covered by the Full Bench decision where a similar claim was negatived as the plaintiff could not be said to have derived any benefit under the sale, the father's debt having become barred and unenforceable by that time.

It remains only to consider the plaintiff's claim to mesne profits. It was urged for the defendants that as the sale was only voidable by the plaintiff on attaining majority and not void *ab initio*, mesne profits could be allowed only from the date of his plaint wherein he first repudiated the transaction, and not before. In the Full Bench decision referred to already there was no discussion of this question and so the matter was allowed to be argued before us. Reference was made to *Subbu Goundan* v. *Krishnamachari*[1] and *Ramaswami Aiyar* v. *Venkatarama Aiyar*[2], in support of the defendant's contention. Those cases related to sales of coparcenary property by the manager of a Hindu joint family and it was held that such alienations, where no necessity was established, being only voidable at the instance of other coparceners and not void, the alienee was accountable for mesne profits only from the date of suit if there was no earlier repudiation of the sale. It seems to us that the test of void or voidable is not always decisive on the question of liability for mesne profits. Rejecting the contention that a vendee who obtained a sale of immoveable property by practising fraud on the vendor was not liable for mesne profits until the vendor elected to avoid the transaction, the Privy Council observed in *Satgur Prasad* v. *Harnarain*[3].

> "It was in effect a conveyance, under which the title to the properties passed to the defendant, and which had to be formally set aside. Before the institution of the suit the defendants could no doubt have made a valid transfer to an innocent purchaser, *but it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful.*" (Italics ours.)

Even in the case of a sale of joint family property their Lordships make a distinction between a case where the sale is set aside unconditionally and a case where it is set aside only on the payment of a certain sum of money. On the other hand, in *Gopalakrishnamoorthi* v. *Satyanarayana*[4], Varadachariar, J., who delivered the judgment of the Bench held that a reversioner suing to recover possession of lands alienated by a Hindu widow without necessity was entitled to mesne profits prior to suit even where the decree for possession was conditional on payment of certain sums. The learned Judge distinguished cases of alienations by a father in a Mitakshara joint family and by the guardian of a minor pointing out that in such cases Articles 126 and 44 respectively of the Limitation Act contemplate suits to set aside

---

1. (1921) 42 M.L.J. 372 : I.L.R. 45 Mad. 449.
2. (1923) 45 M.L.J. 203 : I.L.R. 46 Mad. 815.
3. (1932) 62 M.L.J. 451 : L.R. 59 I.A. 147 : I.L.R. 7 Luck. 64 (P.C.).
4. (1939) 2 M.L.J. 388.

the alienation whereas Article 141 which applies to suits by reversioners merely refers to a suit for possession. Explaining the decision in *Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi*[1], the learned Judge pointed out that an alienation by a Hindu widow without any necessity was voidable only in the sense that it was not so absolutely void that it could not even be ratified by the reversioner, but it was not necessary for him to seek the intervention of the Court to set it aside before he became entitled to possession. The position in the present case is closely analogous. While an alienation by a *de facto* guardian for necessity has been held to bind the minor, this Court has repeatedly held that he need not sue to set aside an alienation without necessity by such a person, within three years of attaining majority, but can sue for possession treating it as a nullity just like a reversioner (vide *Thayammal* v. *Kuppanna Koundan*[2] and *Ramaswami Pillai* v. *Kasinatha Aiyar*[3]). That is to say, no improper alienation by a *de facto* guardian is binding on the minor until it is set aside, although it may be voidable in the sense that he may elect either to ratify it or avoid it by treating it as a nullity. Here the sale to the defendants having been made by a *de facto* guardian without any valuable consideration to support it, the defendants should be held accountable for mesne profits from the date of the agreement for sale when possession was delivered to them.

In the result, the appeal (S. A. No. 1342 of 1944) is dismissed with costs. The memorandum of objections is allowed with costs and there will be a decree for possession of the properties claimed. The case will be remitted to the trial Court for ascertainment of the mesne profits. The costs of the plaintiff in all the Courts will be provided for in the final decree. S A. No. 1343 of 1944 is dismissed but we make no order as to costs as it follows the result of the other appeal.

K.S. —— *Appeals dismissed and memorandum of objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Kuralla Suryanarayana .. *Appellant**

v.

Akumuri Purnachandra Row and another .. *Respondents.*

Contract Act (IX of 1872), *section* 72—A *and* B *buying a site in their name and building a house on it with money belonging to their nephew* C—A *and* B *raising further funds to complete the building and mortgaging the property to* D *as security for the loan*—X *buying the property subject to the mortgage in a sale in execution of a money decree against* A *and* B—X *paying* D *the amount due on the mortgage*—C *establishing his title and recovering the property from* X—*Right of* X *to recover amount paid to* D.

A and *B*, the uncles of *C*, bought a plot of land in their own name and built a house on it with the money belonging to *C*. In order to raise further funds to complete the building they mortgaged the property to *D*. The property was subsequently sold subject to the mortgage in execution of a money decree against *A* and *B* after the dismissal of *C's* claim petition. *X* the purchaser at the sale paid *D* the amount due on his mortgage after the dismissal by the trial Court of *C's* suit under Order 21, rule 63 of the Code of Civil Procedure to establish his title. *C* however succeeded in establishing his title in the Court of appeal and ultimately recovered possession of his property from *X*. In a suit by *X* against *C* and *D* for recovery of the amount paid by him to *D*,

Held, that (1) *X* was not entitled to any relief against *C* or his property.

Ammani Ammal v. *Ramaswami Naidu*, (1918) 37 M.L.J. 113, followed.

(2) *X* however cannot be regarded as a volunteer when he paid the amount due on the mortgage to *D*, and was therefore entitled to recover the amount from *D* as money paid under a mistaken belief that a valid mortgage had been created.

Sowdra Bai v. *Saraswathi Ammal*, (1942) 1 M.L.J. 441 : I.L.R. (1942) Mad. 669, applied.

---

1. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).
2. (1914) 27 M.L.J. 285 : I.L.R. 38 Mad. 1125.
3. (1927) 108 I.C. 529.

* Appeal No. 275 of 1944. 27th August, 1945.

Appeal against the decree of the District Court of Kistna, Chilakalapudi, dated 4th December, 1943, and passed in O. S. No. 38 of 1942.

V. Govindarajachari and *K. Mangachari* for Appellant.

M. Appa Rao and *B. V. Subramanyam* for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—When the facts of this case are understood the decision of the appeal presents no difficulty.

On the 19th May, 1936, the land in suit was bought by two brothers, A. Brahmayya Sastri and K. Suryaprakasa Rao. They are referred to in the judgment of the trial Court as "the Sastri brothers" and it will be convenient to refer to them as "the Sastri brothers" in this judgment. They bought the land in their own name. The money belonged to their nephew, the first defendant in the suit. With the balance of the money belonging to the first defendant they commenced to build a house on the land. The money was not sufficient to complete the building and in order to raise further funds they mortgaged the property to the second defendant on the 20th August, 1936, to secure a loan of Rs. 2,000.

In Original Suit No. 434 of 1937, one K. Ramabrahmam had obtained a money decree against the Sastri brothers and in execution had attached the property in suit. On the 30th July, 1938, the first defendant, who is a nephew of the Sastri brothers, filed a claim petition in the execution proceedings. He averred that the property belonged to him. This application was dismissed and the sale then took place. At the auction the plaintiff bought the property for Rs. 1,020, subject to the mortgage of the second defendant. On the 12th September, 1938, the first defendant filed Original Suit No. 380 of 1938 under the provisions of Order 21, rule 63 to establish his right to the property. On the 25th September, 1939, the suit was dismissed. The first defendant appealed and his appeal was allowed on the 23rd December, 1940. The plaintiff then appealed to this Court, but he was unsuccessful. His appeal was dismissed on the 25th September, 1941.

On the 30th September, 1939, that is, five days after the first defendant's suit had been dismissed by the trial Court, the second defendant called upon the plaintiff as the purchaser of the property to pay the sum of Rs. 2,636-11-9, the amount then due upon the mortgage. On the 26th October, 1939, the plaintiff paid to the bank in discharge of the mortgage the sum of Rs. 2,654-2-6. The increase in the amount due to the second defendant represented additional interest.

On the 16th June, 1942, the first defendant, as the result of his successful appeal, filed an application asking for an order for restitution. This was granted and he obtained delivery of the property. On the 29th June, 1942, the plaintiff gave notice to the second defendant requiring the repayment of the Rs. 2,654-2-6. The second defendant refused to comply with the demand and the plaintiff filed the present suit on the 26th October, 1942.

The District Judge held that the mortgage was void as against the first defendant as the Sastri brothers had no right to charge the property. In fact their action amounted to fraud on the first defendant. The District Judge refused the plaintiff relief as against the 2nd defendant on the ground that in paying the Rs. 2,654-2-6 to the second defendant he was a mere volunteer. The plaintiff has appealed.

In the trial Court the plaintiff accepted the position that the property belonged to the minor. He could not do otherwise because he was a party to the minor's suit and on appeal it was held that the property did belong to the minor. He asked, however, that the property be charged with the Rs. 2,654-2-6 as that money had been spent on the completion of the house. As the property did belong to the minor and as the Sastri brothers had no authority to charge it, the plaintiff was clearly not entitled to any charge in respect of the money which he had paid to the second defendant. The case falls within the decision of this Court in *Ammani Ammal*

v. *Ramaswami Naidu*[1]. Therefore the District Judge was right in holding that the plaintiff was not entitled to any relief against the minor or the minor's property.

The question then is, is the plaintiff entitled to relief as against the second defendant? We think that he is and that the District Judge erred in his decision on this part of the case. Section 72 of the Contract Act says that a person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it. When the plaintiff paid Rs. 2,654-2-6 to the second defendant he was under the belief, and so was the second defendant, that a valid mortgage had been created. That was a mistaken belief and it entitles the plaintiff to a decree for repayment as against the second defendant. The decision of this Court in *Sowdra Bai* v. *Saraswathi Ammal*[2] has direct application. The District Judge was wrong in regarding the plaintiff as a volunteer.

In the course of his address on behalf of the second defendant Mr. B. V. Subramaniam accepted the position that section 72 of the Contract Act applied as between the plaintiff and his client if the mortgage was invalid and that in such circumstances *Sowdra Bai* v. *Saraswathi Ammal*[2] was directly in point. He attempted, however, to argue that the mortgage was binding on the first defendant. The second defendant was not a party to the suit filed by the first defendant under Order 21, rule 63 and therefore the decision in that case was not binding on him. It was, however, open to the second defendant in the present suit to lead evidence, if he could, to show that the property did in fact belong to Sastri brothers. The first issue framed was to this effect. The second defendant did not lead any evidence on the question and as the record stands there is no material on which the argument can be based. Moreover, in the second defendant's written statement no relief was sought as against the first defendant. The only contest was whether the plaintiff was entitled to relief against the defendants or either of them.

In *Ammani Ammal* v. *Ramaswami Naidu*[1], it was held that where the guardian of a minor purports to sell the minor's properties as his own, the minor is entitled to recover possession and mesne profits on attaining his majority without repaying the debts binding upon him discharged out of the purchase money. Therefore it is obvious that the second defendant cannot obtain relief against the first defendant and, as we have already pointed out, no relief was sought in the written statement. The present argument is merely an after-thought when it became apparent that the plaintiff was entitled to recover the Rs. 2,654-2-6 from the second defendant.

The result is that the appeal is dismissed as against the first respondent (first defendant) and is allowed as against the second respondent (second defendant). The appellant will pay the first respondent's costs and will receive costs from the second respondent who will also pay the appellant's costs in the trial Court.

The second respondent has filed a memorandum of cross-objections, but this has not been pressed. It is dismissed with costs as against the appellant.

K.S. ——— *Appeal dismissed against 1st respondent.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE LAKSHMANA RAO.

Ravikanti Kanoji Rao and others .. *Appellants**

v.

Sri Sri Sri Mirja Sri Purapati Vizianama Gajapathiraju Bahadur, minor Rajah, Vizianagaram and another .. *Respondents.*

Madras Estates Land Act (I of 1908), section 25 (as amended by the Amending Act VIII of 1934)—Premium on "old waste"—Direction for payment in compromise decree passed after the Amending Act of 1934 had come into force—Executability.

1. (1918) 37 M.L.J. 113.
2. (1942) 1 M.L.J. 441 : I.L.R. (1942) Mad. 669.
3. (1918) 37 M.L.J. 113.

* L. P. A. No. 1 of 1945. 4th April, 1945.

A compromise decree passed on the 3rd October, 1934, directed among other things the payment of a certain sum representing the premium on land described as "old waste". Before the date of the decree the amendment of section 25 of the Madras Estates Land Act by the Amending Act of 1934 which rendered such a payment illegal, had already come into force on the 27th June, 1934. On a question as to the executability of the compromise decree in regard to the amount of the premium,

Held, that when the compromise decree was passed it was unlawful to include therein a direction for the payment of the premium and that being the case, that part of the decree which related to the payment of the premium could not be executed. The fact that the application to pass the compromise decree was filed on the 10th October, 1933, at a time when the premium could be lawfully levied, could not affect the question because, at the date when the decree was actually passed, the Court had no power to pass, even by consent, a decree containing such a provision which was unlawful by reason of a statute.

Appeal under clause 15 of the Letters Patent against the judgment and order of Wadsworth, J., dated 17th November, 1944, in A. A. O. No. 814 of 1943, preferred against the order of the District Court, Vizagapatam, dated 21st August, 1943, and made in E. P. No. 2 of 1943 (E. P. No. 40 of 1941, in O. S. No. 18 of 1923, Subordinate Judge's Court, Vizagapatam).

Y. Suryanarayana for Appellants.

S. Venkatesa Aiyangar for Respondents.

The Judgment of the Court was delivered by

The Chief Justice.—This is an appeal under clause 15 of the Letters Patent from the judgment of Wadsworth, J.,[1] in an appeal against an order passed in execution proceedings in the Court of the District Judge of Vizagapatam. The question raised in the appeal before the learned Judge related to an amount of Rs. 676 which represented a premium on land described as "old waste." The payment of the premium was directed by the compromise decree. The appellants contended that that part of the decree which related to the payment of the premium was illegal by reason of section 25 of the Madras Estates Land Act, as amended by the Madras Estates Land (Amendment) Act, 1934 (hereinafter referred to as the Amending Act) and therefore the case fell within the decision of this Court in *Ambu Nair* v. *Kelu Nair*[2]. The learned Judge dismissed the appeal as he was under the impression that the compromise decree was passed before the amendment of section 25 in 1934. This was not in fact the case. The Amending Act received the Governor-General's assent on the 27th June, 1934, and the compromise decree was not passed until the 3rd October, 1934. The date on which the Amending Act came into force was not mentioned at the hearing before Wadsworth, J. We have no doubt that it was assumed by the parties that the decree was passed before the Amending Act became effective.

It is now clear that when the compromise decree was passed it was unlawful to include therein a direction for the payment of the premium and this being the case that part of the decree cannot be executed. The judgment of the Division Bench which heard *Ambu Nair* v. *Kelu Nair*[2], where all the authorities on the question are reviewed, leave no room for doubt. The learned advocate for the respondents seeks however to get out of the difficulty by pointing to the date when the petition asking for the passing of a compromise decree was filed in Court. It was filed on the 10th October, 1933, when a premium could be levied in respect of "old waste." His argument is that as the decree only embodied what had been lawfully agreed upon by the parties in October, 1933, the decision in *Ambu Nair* v. *Kelu Nair*[1] can have no application. We are unable to accept this contention. When the Court passed the compromise decree it was unlawful for the landholder to levy a premium. Therefore the Court had no power to pass, even by consent, a decree containing a provision which was unlawful by reason of a statute.

The appeal is allowed with costs throughout.

V.S. —— *Appeal allowed.*

1. (1945) 1 M.L.J. 432.
2. (1929) I.L.R. 53 Mad. 805.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Mylavaram Adisubbayya .. *Petitioner**

v.

Panchangam Subba Sastry .. *Respondent.*

Madras Debt Conciliation Act (XI of 1936), sections 10 (2) and 19 (b)—Discharge of debts under section 10 (2)—Statutory and not dependant on orders of the Board—Order of the Board under section 10 (2) discharging a decree debt for non-production of accounts by the creditor concerned—Legality—If can be pleaded in bar of execution of that decree—Scope of the bar of execution contained in section 19 (b).

In respect of a decree debt mentioned by the applicant in his application under section 4 of the Madras Debt Conciliation Act, the Board passed an order that as the creditor concerned did not produce the account books they were compelled to take action against him under section 10 (2) of the Act according to which they said the debts due to him by the debtor should be deemed to have been discharged for all purposes and for all occasions. In a subsequent execution application for the execution of that decree it was contended that by reason of the order of the Debt Conciliation Board, the decree debt stood discharged, and that there was no debt due in respect of which execution could be levied.

Held, negativing such a contention, that the effect provided in section 10 (2) of the Act in the event of a statement of debts not having been filed, of the debts standing discharged, is statutory and follows as a matter of law, and no specific order is required for that purpose. There can be nothing like action under section 10 (2) which can be taken by the Board. Such action of discharging the debt cannot be taken for the non-production of accounts, the penalty contemplated for which is that provided by section 11 of the Act and not the penalty enacted in section 10 (2). Hence in the circumstances, the order of the Board was *ultra vires* and should be ignored as such and the execution should be proceeded with.

Section 19 (2) of the Act bars only those execution petitions in which execution has been suspended under sub-section (3) of section 18 of the Act.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Anantapur dated 13th June, 1944, and passed in A. S. No. 56 of 1944 (E. P. No. 83 of 1943, in O. S. No. 607 of 1933, District Munsiff's Court, Penukonda).

V. S. Narasimhachar for Petitioner.

T. S. Narasinga Rao for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner obtained an assignment of the decree in O. S. No. 607 of 1933 of the District Munsiff's Court of Penukonda and applied in E. P. No. 83 of 1943 for the execution of the decree against the respondent. The respondent had filed an application before the Debt Conciliation Board under section 4 of the Act for the settlement of his debts and in the application had mentioned this decree debt. The decree-holder in this case had filed a counter therein in which he furnished the necessary particulars relating to his decree debt. The Debt Conciliation Board passed an order on 13th August, 1940, Ex. D-2, in which they concluded that they were compelled to take action against this creditor *inter alia* under section 10 (2) of the Act according to which section they said, the debts due to him by the debtor shall be deemed to have been discharged for all purposes and for all occasions. Subsequently on 5th February, 1943, the execution petition out of which this petition arises was filed and it was opposed by the judgment-debtor on the ground that by reason of the aforementioned order of the Debt Conciliation Board the decree debt stood discharged and hence there was no debt in respect of which execution could be levied. The learned District Munsiff disallowed the objection and allowed execution to proceed. He held that the order of the Board was *ultra vires* of its powers and that it was not necessary that it should be set aside before execution could be proceeded with. On appeal the learned Subordinate

* C. R. P. No. 1480 of 1944. 17th September, 1945.

Judge agreed with the first Court that the order of the Board was erroneous but was of the opinion that it was not *ultra vires* of its powers and that consequently the Civil Court had no jurisdiction to vacate, cancel or ignore the order of the Board. The present application is to revise the said order of the Subordinate Judge.

Section 8 (1) of the Debt Conciliation Act provides :

"On receipt of an application under section 4 the board shall unless it rejects the application under section 7 pass an order fixing a date and place for hearing the application."

In pursuance of the notice issued under that provision the decree-holder appeared and filed the counter in which all necessary particulars about the decree debt were furnished. Section 10 (1) refers to the issue of a further notice after the examination of the debtor calling upon the creditor to submit a statement of debts within two months from the date of service or publication of the notice. Sub-section (2) of section 10 as it then stood before its amendment by Madras Act IX of 1943, provided :

"every debt of which a statement is not submitted to the board in compliance with the provisions of sub-section (1) shall be deemed for all purposes and all occasions to have been duly discharged."

Both the Courts below have held that the counter initially filed in this case by the petitioner was a statement of debt for the purposes of section 10 (1). In fact the learned counsel for the petitioner goes to the length of arguing that if a person's debt is mentioned even in the application filed under section 4 or in the particulars furnished under section 6 that is sufficient compliance with the requirement under section 10 (1) of furnishing a statement of debts. Then section 19 (*a*) (4) says :

"No Civil Court shall entertain any suit in respect of the recovery of any debt which has been deemed to have been duly discharged under sub-section (2) of section 10 . . . . ."

On an examination of these provisions I am inclined to agree with the view taken by the learned District Munsiff. The Act does not require that the Board should pass any order either under section 10 (1) or under section 10 (2). The effect provided in section 10 (2) in the event of a statement of debts not having been filed of the debts standing discharged is statutory and follows as a matter of law, and no specific order of the Board is required for that purpose. In fact the order by the Board in this case is that the creditor did not produce accounts and that consequently it was compelled to take action under section 10 (2) of Act XI of 1936. Firstly, there is nothing like action under section 10 (2) which can be taken by the Board, and secondly, such action of discharging the debt cannot be taken for the non-production of accounts. The case of non-production of accounts is covered by section 11 which postulates that where the necessary documents including entries in books of account are not produced such documents shall not be admissible in evidence against the debtor in any suit brought by the creditor or by any person claiming under him for the recovery of the debt. That is the only penalty that is contemplated for the non-production of accounts and not the penalty enacted in section 10 (2) of the Act. Having regard to all these circumstances there is no doubt in my mind that the order of the Debt Conciliation Board was *ultra vires* and is liable to be ignored. Attention was drawn to the bar provided under section 19. That bar is against filing of suits. With reference to execution petitions, section 19 (*b*) bars only those execution petitions in which execution has been suspended under sub-section (3) of section 18. The learned District Munsiff was therefore right in the view that the order of the Board should be ignored as a nullity and execution should be proceeded with. The petition is allowed with costs throughout, reversing the order of the Subordinate Judge of Anantapur and restoring the order of the District Munsiff.

V.S. *Petition allowed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna.)

PRESENT :—LORD SIMONDS, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Chathurbuj Singh and others . . . . . . *Appellants**

v.

Gobind Prasad Singh . . . . . *Respondent.*

Registration Act (XVI of 1908), section 47—Effect of registration on the date of operation of the document registered—Subsequent notice threatening to ignore the document—Efficacy of the document not destroyed—Civil Procedure Code (V of 1908), Order 41, rule 27 (1) (b)—Applicability—Conditions for.

A document takes effect according to its terms from the date thereof as soon as it is registered unless there is anything in the document itself to indicate the performance of any act as a condition precedent to the document taking effect.

A notice issued thereafter by one of the parties to the document to the other party thereof containing a threat that he would feel free to ignore it if the other omitted to take certain steps and no action was taken on it by either party, is only an idle threat which could not destroy the efficacy of the formal document duly executed and registered.

It is only where an appellate Court requires additional evidence to enable it to pronounce judgmen or for any other sufficient cause, that the sub-rule applies. Where there is nothing to suggest that the appellate Court found it necessary to admit a document in evidence, in order to enable it to decide the case properly and the document was one on which one of the parties relied and which he could have put in evidence in the trial Court, no case arose for the admission of such a document in evidence under rule 27 (1) (b) of Order 41, Civil Procedure Code.

S. P. Khambatta for Appellants.

W. H. Wallach for Respondent.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 27th October, 1941, which on second appeal reversed the judgment and decree of the Additional District Judge of Gaya, dated the 21st June, 1940, and restored the judgment and order of the Munsiff of Jahanabad, dated the 6th March, 1940, decreeing the respondent's suit with costs.

The question for determination in the appeal is whether the transactions entered into by the respondent, plaintiff, and the appellants, defendants, on the 24th February, 1938, resulted in a contract of tenancy. The trial Court held that there was such a contract; the first appellate Court that there was no such contract; and in second appeal the High Court reversed that decision, and restored the decree of the trial Court.

At the time of the transactions in question, the defendants owed to the plaintiff the sum of Rs. 18,500 on a simple mortgage, dated the 17th June, 1929. The first document of the 24th February, 1938, was a usufructuary mortgage, called a *zurpeshgidar thicca*, by which the defendants mortgaged to the plaintiff their 10 annas share in certain immoveable property to secure Rs. 16,000 and on the terms that Rs. 2,500 were to be paid in cash. This was expressed to be in substitution for the rights of the plaintiff under the mortgage of 1929. By the second document of the same date the plaintiff executed in favour of the defendants a sub-lease, or *katkana*, of the property included in the usufructuary mortgage at an annual rent of Rs. 960.

The rent under the sub-lease not having been paid, the plaintiff on the 15th December, 1938, instituted the suit out of which this appeal arises, in the Court of the Munsiff of Jahanabad, claiming a sum of Rs. 1,055 on account of rent and interest under the sub-lease. The defences raised were that the documents of the 24th February, 1938, had never taken effect as conditions precedent had not been performed.

On the 6th March, 1940, the learned Munsiff decreed the suit in favour of the plaintiff. He held that the usufructuary mortgage and the sub-lease had been duly executed and registered, and that the documents took effect according to their terms, there being no obligation to perform any condition precedent.

* P. C. A. No. 32 of 1944. 23rd July, 1945.

The defendants appealed against this decision and on the 21st June, 1940, the appeal was allowed by the Additional District Judge of Gaya. The learned Judge held that the simple mortgage of 17th June, 1929, did not appear to have been satisfied as there was no endorsement on the bond to that effect, and that accordingly the usufructuary mortgage of 24th February, 1938, was without consideration. This is clearly an error, as the High Court pointed out, as the usufructuary mortgage itself showed that the original mortgage was discharged by the terms embodied in the usufructuary mortgage. The learned Additional District Judge further held that the documents of the 24th February, 1934, were not intended to take effect according to their terms since the defendant had withdrawn the usufructuary mortgage from the Registry Office and it did not pass into the hands of the plaintiff, and in the case of the sub-lease, both parties retained their respective portions of the document and there had been no exchange of counterparts, and no notice of the transaction had been given to Parsidh Narayan, the owner of the free-hold of the property dealt with by the documents. The learned Judge relied strongly in support of his view that the matter had never proceeded beyond the stage of negotiations, on a notice given some time in August, 1938, by an agent of the plaintiff to the defendants, calling upon the defendants to pay up the Rs. 2,500 in cash, to exchange the registration tickets and the documents, and to give notice of the transaction to Parsidh Narayan within a fortnight of the date of the receipt of the notice, and adding :

> "If you fail to comply with the terms of this notice, my client will take it that you do not propose to stick to the transaction of *ijara* and *katkana* and my client will be free to institute a suit on the mortgage bond of 17th June, 1929."

The learned Judge allowed that notice to be given in evidence in the appeal and it was marked Ex. B.

In second appeal the High Court of Patna reversed the decision of the Additional District Judge. The learned Judges held that the two documents of the 24th February, 1938, as soon as registered took effect according to their terms, and that the notice of August, 1938, Ex. B should not have been admitted in evidence. Mr. Justice Rowland also expressed the opinion that even if the notice were admitted, it would have no effect upon the legal position.

Their Lordships agree with the decision and reasoning of the High Court. They think it clear that the two documents of the 24th February, 1938, took effect according to their terms from the date thereof as soon as they were registered (see section 47 of the Indian Registration Act). There is nothing in either document to suggest that an exchange of counterparts or notice to the free-holder was a condition precedent to the documents taking effect. Mr. Khambatta, for the appellant, has argued that the notice, Ex. B, indicates an intention on the part of the parties that the documents should not take effect according to their terms and that this notice displaces the presumption to the contrary which would otherwise arise from the terms of the documents. It appears that the original of this notice was filed by the plaintiff with the plaint, but it was subsequently withdrawn by the plaintiff in circumstances which are not disclosed. The defendant, however, possessed a copy which he could have proved at the trial had the plaintiff declined to produce the original, and this he made no attempt to do. In the first appeal, however, the defendant tendered a copy which does not appear to have been strictly proved, and the learned Judge admitted it in evidence as already stated. Their Lordships agree with the view of the High Court that the admission of the document was not justified by the terms of Order 41, rule 27 (1) (*b*). This Board has pointed out in *Kessowji Issur* v. *Great Indian Peninsula Railway Company*[1] and in *Parsotim* v. *Lal Mohar*[2] that it is only where an appellate Court requires additional evidence to enable it to pronounce judgment or for any other sufficient cause, that the sub-rule applies. There is nothing to suggest that the first appellate Court found it necessary to

1. (1907) 17 M.L.J. 347 : L.R. 34 I.A. 115 : I.L.R. 31 Bom. 381 (P.C.).
2. (1931) 61 M.L.J. 489 : L.R. 58 I.A. 254 : I.L.R. 10 Pat. 654 (P.C.).

admit this document in order to enable it to decide the case properly. The document was one on which the defendant relied and which he could have put in evidence in the lower Court and, in their Lordships' view, no case arose for admitting the document in appeal. Their Lordships further agree with the view of Mr. Justice Rowland that even if the document be admitted, it cannot have the effect claimed for it. The document contains a threat as to what the plaintiff would feel free to do if the defendant omitted to take certain steps. The plaintiff took no action on the notice, nor did the defendant treat it as cancelling the usufructuary mortgage and sub-lease and restoring his liability under the original mortgage. An idle threat of that sort cannot destroy the efficacy of two formal documents duly executed and registered.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondent: *T. L. Wilson & Co.*

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Kaza Satyanarayana and others .. *Petitioners.**

Madras Gaming Act (III of 1930), sections 9 and 6—Evidence negativing element of profit or gain to owner of the house concerned—Conviction under section 9, not warranted—Scope and effect of section 6—Nature of the evidence afforded by the instruments of gaming and the persons found in a place searched under section 5.

Under the definition of a "common gaming house" as defined in section 3 of the Madras Gaming Act, the element of profit or gain is an essential ingredient and, when this is negatived by the evidence in the case, there is nothing to warrant a conviction of the persons found in such house under section 9 of the Act, which postulates of course the position that persons found gaming were present for the purpose of gaming in a gaming house.

All that section 6 of the Act says is that the instruments of gaming and the persons found in a place searched under section 5 shall be evidence that such place is used as a common gaming house and that the persons found therein were present for the purpose of gaming, although no play was actually seen by the police officer or any of his assistants. It is only a piece of evidence in support of the prosecution for an offence under section 9. But it would be wrong to treat it as conclusive evidence warranting a finding of guilty of the persons found therein without anything more.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate, Bezwada, dated 25th April, 1945, in C. A. No. 22 of 1945 preferred against the judgment of the Court of the Stationary Sub-Magistrate, Gudiwada, in C. C. No. 1791 of 1944.

C. K. Venkatanarasimhan for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The learned Sub-Divisional Magistrate has misdirected himself on the meaning, scope and effect of section 6 of the Gaming Act. All that the section says is that "any card, dice, gaming table or cloth, board or other instruments of gaming found in any place entered or searched under the provisions of section 5, or on any person found therein shall be evidence that such place is used as a common gaming house, and that the persons found therein were there present for the purpose of gaming, although no play was actually seen by the police officer or any of his assistance." It is only a piece of evidence in support of the prosecution. He was wrong in thinking that it was a conclusive piece of evidence warranting a finding of guilty without anything more. On the other hand, in this case, the trial Court found on the evidence adduced that the third accused was not using the house for purposes of any profit. These are his words "The evidence adduced shows that the accused is not deriving any profits by running a gaming house".

---

* Cr. R. C. No. 675 of 1945. 1st November, 1945.
(Cr. R. P. No. 631 of 1945.)

Under the definition of a common gaming house, the element of profit or gain is an essential ingredient and, when this has been negatived, there is nothing to warrant a conviction under section 9, which postulates of course the position that the persons found gaming were present for the purpose of gaming in a common gaming house.

The convictions are set aside and the fines, if paid, will be refunded. The property seized will be delivered back to those from whom they were seized.

V.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAJAMANNAR.

Mulla Madina Saheb .. *Appellant**

v.

The Province of Madras represented by the Collector of West Godavari, Ellore .. *Respondent.*

Workmen's Compensation Act (VIII of 1923), section 19 (2) and section 12 (2)—Principal paying compensation claiming right to indemnity from contractor—Jurisdiction of Civil Court.

There is nothing in the Workmen's Compensation Act which makes an order for compensation to the dependants of a deceased workman to which a person like a contractor, sought to be made liable to indemnify the principal paying the compensation was not a party, binding on him for all purposes including the liability to indemnify. An order awarding compensation is entirely distinct and different from an order allowing or disallowing a claim for the indemnity. The Commissioner has jurisdiction to decide the question of liability to indemnify the principal.

Section 19 (2) of the Workmen's Compensation Act precludes the Civil Court from deciding any question which is to be decided by the Commissioner under the Act. Where the principal withholds an amount due to a contractor claiming it as indemnity for compensation paid by him to a deceased workman's dependants without obtaining from the Commissioner a declaration of a right to such indemnity and the contractor sues in the Civil Court for the recovery of the amount so withheld, the principal cannot rely on his right to indemnity as a defence in the Civil Court as he had not established the right before the Commissioner. Section 19 (2) of the Act is no bar to the contractor's suit but it will be a bar to the principal asserting his right to indemnity.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in A.S. No. 301 of 1943 preferred against the decree of the Court of the District Munsiff of Kovvur in O.S. No. 287 of 1941.

K. Kameswara Rao for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff is the appellant. He was a contractor under the Public Works Department and entered into a contract (Ex. D-18) on the 29th February, 1940, for doing some work on the Nidadavole-Chettipet Road. It is said that during the execution of this work a cooly named Subbadu slipped and fell into a canal and got drowned on the 9th April, 1940. This accident was reported to the Commissioner appointed under the Workmen's Compensation Act, under section 10-B of the said Act. The Commissioner issued a notice on the 6th May, 1940, to the Chief Engineer to the Government to submit a statement of particulars and also make the necessary deposit as provided under section 10-A (2) of the Act. The Chief Engineer replied disclaiming liability to pay any compensation on the ground that the cooly accidentally fell into the canal and died on account of epileptic fits that he was suffering from. Subsequently, however, on further correspondence between him and the Commissioner, the Chief Engineer admitted liability in his letter dated 4th September, 1940, whereupon a compensation of Rs. 500 as fixed by the Commissioner was remitted to be paid over to the dependants of the deceased workman.

Admittedly moneys were due to the plaintiff for the work done by him under the contract and in paying his dues the Government deducted a sum of Rs. 500 being the amount which was paid as compensation to the dependants of the deceased workman and the balance after deduction was paid to the plaintiff on

---

* S. A. No. 2030 of 1944. 20th September, 1945.

11th November, 1940. Immediately the plaintiff sent a notice through his lawyer to the Government reiterating the protest which he had made even at the time of the receipt of the balance of the amount and categorically denying his liability to pay the sum of Rs. 500 as indemnity to the Government. No action appears to have been taken by the Government on this notice though in Ex. P-1 the proceedings of the Executive Engineer, Godavari West at Nidadavole, we find the following statement being made by the Executive Engineer—

> "It is also presumed that he will be getting a notice from the Commissioner to present his objection statement, if any, and that he can represent his case to the Commissioner, if necessary."

Evidently there was no proceeding before the Commissioner as was contemplated by Ex. P-1. The plaintiff then filed the present suit for recovering the sum of Rs. 500 still due to him in respect of the work done by him under the contract and for interest on that amount. The plea of the Government in the written statement was that the Civil Court had no jurisdiction since the Commissioner had decided under the powers given to him by the statute the liability of the employer to pay compensation for the injury caused. In paragraph 5 it is stated—

> "The Commissioner of Workmen's Compensation Act of 1923 held the deceased to be a workman within the meaning of the Act and that compensation is therefore payable under section 12 (2) of the . . . . . Act and that the defendant (Chief Engineer) is entitled to be indemnified by contractor (plaintiff)."

In answer to a question from me the learned Government Pleader admitted that there was no order of the Commissioner holding that the Government is entitled to be indemnified by the contractor.

Both the lower Courts have dismissed the suit on the ground that section 19 (2) of the Workmen's Compensation Act (VIII of 1923) deprives the Civil Court of jurisdiction to entertain the suit. Section 19 (2) is in these terms :

> "No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act."

To understand the contentions of the parties in this case it is necessary also to refer to section 12 of the Act which is in these terms :

> "(1) Where any person (hereinafter in this section referred to as the principal) in the course of or for the purposes of his trade or business contracts with any other person (hereinafter in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work which is ordinarily part of the trade or business of the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation which he would have been liable to pay if that workman had been immediately employed by him ; and where compensation is claimed from the principal, this Act shall apply as if references to the principal were substituted for references to the employer except that the amount of compensation shall be calculated with reference to the wages of the workman under the employer by whom he is immediately employed.
>
> (2) Where the principal is liable to pay compensation under this section, he shall be entitled to be indemnified by the contractor, or any other person from whom the workman could have recovered compensation and where a contractor who is himself a principal is liable to pay compensation or to indemnify a principal under this section he shall be entitled to be indemnified by any person standing to him in the relation of a contractor from whom the workman could have recovered compensation, and all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner."

* * * * *

It is clear that the right of the Government to withhold the sum of Rs. 500 from the amount admittedly due to the plaintiff is based on the right given to them as principal under sub-section (2) of section 12. But that sub-section provides that all questions as to the right to and the amount of any such indemnity shall, in default of agreement, be settled by the Commissioner. In this case there was no agreement between the Government and the contractor in regard to the right to or the amount of indemnity. From the outset, the plaintiff was protesting against the action of the Government in withholding the amount of Rs. 500. In my opinion in such circumstances as mentioned above, when the right of the Government to be indemnified is being disputed by the plaintiff the question had to be

decided by the Commissioner. I do not agree that it was incumbent on the plaintiff to have approached the Commissioner or to have applied to the Commissioner for adjudication. It was the Government that was claiming a right to be indemnified and if that right was not accepted by the contractor, then the question " as to the right" had to be settled by the Commissioner and, in my opinion, it is a reasonable construction to hold that it is for the party claiming a right to initiate proceedings for adjudication in respect of that right.

Admittedly there was no reference to the Commissioner and no decision by him of either the right to or the amount of the indemnity claimed by the Government.

The learned Government Pleader contended that the latter part of sub-section (2) of section 12 will only apply when a contractor admits that the Government was held rightly liable to pay compensation, but nevertheless he was not liable to indemnify the Government. He also contended that once the Commissioner had decided that the Government was liable to pay compensation, the Government obtained an absolute right to be indemnified by the contractor and it was not open to the contractor to deny such right of indemnity. There are two answers to his contention. The first is that there is nothing in the enactment itself which excludes any case of disputed right to indemnity from the jurisdiction of the Commissioner to adjudicate under sub-section (2) of section 12. When the words of the statute are :

" all questions as to the right to and the amount of any such indemnity . . . shall be settled by the Commissioner."

I do not think the Court will be justified in reading words which are not to be found in the enactment so as to exclude certain questions as to this right to the indemnity. The second is more important as it concerns a fundamental principle of all civilised jurisprudence. In this case admittedly the plaintiff was not a party to the proceedings of the Commissioner in and by which it was decided that compensation was payable by the Government. No notice even went to the plaintiff. It is not necessary for me to decide whether notice had to go as was held in *Bisweswar* v. *Khagendra*[1]. But the fact remains that there was no notice and the plaintiff was not a party and there is nothing in the Workmen's Compensation Act which makes an order to which he was not a party binding on him for all purposes including his further liability to indemnify the principal held liable to pay compensation under section 12 (1) of the Act. The contention of the learned Government Pleader amounts to this. A principal may even wrongly be held liable to pay compensation by the Commissioner or it may be, as in this case, a principal may agree to pay compensation. Then in spite of the fact that the liability was wrongly incurred or was incurred without any adjudication, the contractor will be liable to indemnify the principal and will not have a right to place material before the Commissioner to show that the order to which he was not a party was not correct and cannot adversely affect his rights. To me the Act does not appear to contemplate this injustice. The learned Government Pleader says that the party, *i.e.*, the contractor may approach the Commissioner to review the order granting compensation, but so long as he does not get that order set aside, the Government will have an absolute right to be indemnified in respect of the amount of compensation paid. There is nothing in the Act to support this contention. An order awarding compensation is entirely distinct and different from an order allowing or disallowing a claim for the amount of indemnity. There may be an order for compensation, but there may not be an order allowing indemnity. Section 30 of the Act providing for appeals to the High Court mentions separately an appeal against an order awarding compensation in clause (*a*) and an appeal against an order allowing or disallowing any claim for the amount of indemnity under the provisions of sub-section (2) of section 12 under clause (*d*).

It is true that section 19 (2) precludes the Civil Court from deciding any question which is to be decided by the Commissioner under the Act. But this

1. A.I.R. 1935 Cal. 683.

provision far from disentitling the plaintiff from obtaining any relief really disentitles the defendant-Government from succeeding on any plea based upon their right to indemnity. In fact this provision leaves them without any defence whatever, because they claim to withhold an amount to which the right has not been declared by the Commissioner as it ought to be the case—and it was disputed by the contractor. The lower Courts were therefore wrong in holding that the suit was barred by section 19 (2) of the Workmen's Compensation Act.

As it does not appear that there is any other defence to the suit, the plaintiff will be entitled to get a decree as prayed for with costs throughout. Time for payment—3 months.

Leave refused.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Nemathanpatti M. M. PL. Annadhana Chatram, through its managing trustee, M. M. PL. Chokkalingam Chettiar. .. *Appellant**

v.

P. K. P. R. M. Raman Chettiar and others. .. *Respondents.*

Succession Act (XXXIX of 1925), section 361—Right of unsatisfied creditor of testator to proceed against property in the hands of his executor—Limits—Executor also legatee of that property in trust for a charity—Decree after impleading executor as legal representative of testator—Execution against property devised to charity—Objections to—Proper procedure—Civil Procedure Code (V of 1908), section 47 and Order 21, rule 63—Scope.

Trust—Creation—Essentials—Mere credit entry without setting apart corresponding amounts—Not sufficient to create a trust fund—Unfinished building devised to charity with directions to feed the poor in it after completing the construction—Validity of devise.

Practice—Undervaluation resulting in trial in a Court of lower pecuniary jurisdiction—Objection to jurisdiction—Sustainability on appeal—Suits Valuation Act (VII of 1887), section 11 (2).

The mere fact that the expenses relating to the construction of a building were debited by a testator in his lifetime in a folio headed "chatram building account" cannot be taken as showing that such expenses came out of any trust fund so as to make the building the property of the trust. Mere credit entries in one's own accounts are not sufficient to create a trust unless corresponding sums are actually set apart and appropriated to the charities.

Ramanathan v. *Palaniappa*, (1945) 2 M.L.J. 164 : I.L.R. (1945) Mad. 500, relied on.

Where however the testator by his will devised such a building to the charity and after certain bequests to his second wife and daughter and direction to pay his debts left the residue of his estate to his "private charity funds" appointing his sons and after them their male heirs, executors to carry out all the provisions of the will, there is a valid devise to the charity as a specific legacy of the building, albeit unfinished at the time. The mere fact that the will gave discretion to the executors to vary the *dittam* or established scale in conducting the poor feeding in the building after completing its construction cannot be construed as an indication that the testator did not intend to divest himself and his heirs of the title to the property and to vest it in the executors as trustees for the charity. The use of the words "private charity" in the will can in its context mean only that the control and management was to continue in the testator's own family and it cannot be taken to imply that no real trust was intended to be created. The feeding of the poor is clearly a public charitable purpose and the will operates as a devise of the property to the executors in trust for that purpose.

But the right of an unsatisfied creditor of the estate to proceed against the assets in the hands of the executor cannot be resisted by the latter on the plea that he holds it as a legatee (trustee of the charity) whose title has been perfected by his own breach of duty in not completing the administration of the estate.

Where in respect of a suit commenced against the testator the executor was brought on record as his legal representative and a decree passed, the decree can be executed against the property in the hands of the executor. It is not necessary for the decree-holder to bring another suit to enforce his right under section 361 of the Succession Act. A general administration action is not essential for enforcing the right under the section.

Jaychandra Ray v. *Satishchandra Ray*, (1930) I.L.R. 58 Cal. 170, distinguished.

The executor having been impleaded as legal representative in the suit his objection to attachment of the trust property must be determined under section 47 of the Code of Civil Procedure as a question

* S. A. No. 1652 of 1944. 12th September, 1945.

relating to the execution discharge or satisfaction of the decree and not by a separate suit under Order 21, rule 63 as the executor must be taken to have litigated in his capacities both as executor as well as the specific legatee of the property in question in trust for the charity.

Ramanathan Chettiar v. *Levvai Marakayar*, (1899) 10 M.L.J. 64: I.L.R. 23 Mad. 195 (F.B.) distinguished.

An objection to want of jurisdiction on the ground of undervaluation cannot be entertained in the appellate Court unless the undervaluation has prejudicially affected the disposal of the suit.

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, in A. S. No. 41 of 1943, preferred against the decree of the Court of the District Munsiff of Devakottai in O. S. No. 247 of 1941.

The Advocate-General (*K. Rajah Aiyar*) for Appellant.

S. Venkatesa Aiyangar for Respondents.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises out of a suit brought by the appellant as the managing trustee of a certain charity known as "M.M. PL. Annadhana Chatram" at Nemathanpatti, Ramnad District, for release of a certain land and building from attachment effected in execution of a decree obtained by the first respondent (hereinafter referred to as the respondent) against the legal representatives of one M. M. PL. Palaniappa Chetty.

Palaniappa Chetty was carrying on banking and money lending business in various places in India and Burma with his headquarters at Nemathanpatti. In 1923 the respondent brought a suit against Palaniappa and others in the District Court of Pyapone in Burma for recovery of possession of certain lands and premises with mesne profits. During the pendency of the suit Palaniappa died in 1925, having made a will dated 2nd June, 1925, whereby he bequeathed the bulk of his separate properties to various charities and appointed his two sons Chokkalingam Chetty, the appellant herein, and Kasi Chetty executors under the will to carry out the directions contained therein. These executors were brought on record as the legal representatives of Palaniappa in the suit. Kasi died subsequently and his widow Alamelu Achi was substituted in his place. After a protracted trial the suit ended in a final decree dated 16th October, 1939, directing the appellant and Alamelu Achi to pay to the plaintiff, the respondent in the present appeal, a sum of Rs. 83,131-13-0 for mesne profits and costs. This decree was transferred to the Court of the Subordinate Judge of Devakottai for execution and among other properties the house property now in question was attached by order of Court dated 31st January, 1941. The appellant objected to the attachment of the suit property on the ground that it was "a choultry for poor feeding" having been dedicated by his father to the said charity. The objection was overruled by order dated 1st April, 1941. The appellant then filed a petition on 9th April, 1941, under Order 21, rule 58 of the Civil Procedure Code on behalf of "Nemathanpatti Annadhana Chatram" as the managing trustee thereof claiming that the building placed under attachment belonged to the Annadhana Chatram charity started by his father, that he was feeding Brahmins and other persons every day in that building and that he had no other right therein except the right of a trustee. He accordingly prayed that the property should be declared to belong to Nemathanpatti M. M. PL. Annadhana Chatram and released from the attachment. The claim was rejected by order dated 27th July, 1941, and this suit was brought on 20th November, 1941, under Order 21, rule 63 to establish the right claimed by the appellant as the managing trustee for and on behalf of the charity to the property attached. The trial Court decreed the claim and raised the attachment, but the lower appellate Court reversed the decree and dismissed the suit holding, among other things, that no dedication of the suit property to any charitable purpose was made out.

The main question for determination in this second appeal accordingly is whether there has been such a completed dedication of the suit building for the charitable purpose of free feeding of the poor that Palaniappa or his representatives could no longer claim property in it.

Before considering the question it will be convenient to state a few facts which form the back ground and as to which there has been no dispute before us. Palaniappa Chetty became divided from his sons and his brother's sons in 1919 and his first wife, the mother of the appellant, died in Karthigai of the Tamil year *Dunmathi* corresponding to November-December 1921. On the 16th day of her death, the concluding day of the funeral ceremonies, Palaniappa started in honour of her memory the charity of feeding the poor in an old building belonging to him in his native village Nemathanpatti. No fund, however, was set apart as an endowment for the purpose at the time. In or about September, 1922, Palaniappa Chetty began the construction of the suit building. The accounts maintained by Palaniappa Chetty between 1923 and 1925 have been filed as Ex. P-3 and they show that Palaniappa was entering the sums spent for the construction of the building in a separate folio headed "Chatram building account." Before the construction was completed, he died, as already stated, in 1925, and the building was finished early in 1926. On its completion an inscription carved in stone with the words "M. M. PL. Nemathanpatti Annadhana Dharmasala" in tamil was fixed above the front doorway. The building as completed includes a small temple devoted to the deity Sri Subramanya built in the traditional style with a *gopuram* or turret above the roof, a *stupi* or flag post and a stone peacock, the emblem of the deity, in front. Within the compound of the premises are a small tank and a *nandavanam* or garden for the supply of flowers for worship in the temple. The building comprises a lecture hall and spacious pials, and the total cost of construction amounted to about $1\frac{1}{2}$ lakhs of rupees.

Turning now to the main question the learned Advocate-General put the case for the appellant in two ways : The legal effect of the facts adverted to above, taken cumulatively was to establish an appropriation, even during the lifetime of Palaniappa, of the land and the superstructure under construction to the charitable purpose of using the same when completed for feeding the poor. Alternatively, if there was no such appropriation during his life, the land and building were devised under his will to the chatram charity. As reliance was placed on the recitals in the will in support of the first branch of the contention also, it will be convenient to set out here the relevant provisions in some detail. After referring to the members of the family, the partition of 1919, the state of his health, and the necessity for making "arrangements in respect of the matters connected with the affairs of charity, namely, my estate's private charities, which are being and have been till now conducted by me" the will proceeds as follows :

"In respect of the properties relating to charity out of my personal properties, an account is maintained in the name and style of PL. T. and in respect of other properties an account is maintained in the name and style of M. M. PL. Particulars are mentioned in the charity accounts as to what amounts have been set apart till now for the respective charities and what amounts have been set apart as funds therefor till now, what amounts have been spent till now in connection with charities from the funds set apart therefor and what amounts have been given to others which are to be realised. Such amounts as are to be realised should be duly realised and added to the said fund.

* * * * * * *

Apart from the already existing building, etc., set apart for Annadhana Chatram Charity founded in Nemathanpatti, the building which is now under construction on the eastern side of the road and which is almost complete except for a small portion, should be completed and the said Annadhana charity should be properly conducted from out of the said charity funds.

* * * * * * *

The charities, namely, Nandavanam (flower garden), Pasumadam (cow sheds), Vedaparayanam Patasalai temple kattalais, etc., started by me in Viralimalai should be properly conducted. The buildings situate in that village and the buildings set apart for the respective charities should be used for that charity only. The above-mentioned charities should be well conducted according to the same *Dittam* (established scale) as they have been conducted till now, having regard to circumstances, the then prevailing rates and prices, by increasing or decreasing their *dittam* according to discretion."

Then follow certain bequests to his second wife and his daughter after which the will continues as follows :

"The funds remaining after meeting the expenses of these items which are to be met from my estate as aforesaid should be added to my private charity funds. Those who are holding the position of executors as mentioned below have authority to manage all matters connected with my private charities and my estate as aforesaid, to conduct all that should be duly conducted, to maintain accounts properly in respect therefor, to sell or exchange, having regard to profit, the circumstances and the necessity, all the moveable and immoveable properties except those buildings that have been ear-marked for the respective charities.

* * * * * * *

As I have appointed my eldest son Muthukaruppan Chettiar *alias* Kasi Viswanathan Chettiar and Chokkalingam Chettiar as executors for conducting all the acts aforesaid, they and after them, their eldest male heirs shall duly hold the position of the executors and they shall conduct all matters as mentioned above."

As regards the suggestion that there was a dedication of the property in question to the charity by Palaniappa during his lifetime, it is to be observed that no such case appears to have been raised in the Courts below, the only claim being that the property was given to the charity by and under the will of Palaniappa. That being so, we do not think that it is open to the appellant at this stage to put forward such a case which plainly is not a pure question of law. Even assuming it is a matter of legal inference from facts established by the evidence as suggested for the appellant, we fail to see any basis for such an inference. It would appear, no doubt, that Palaniappa had been conducting a feeding charity since the death of his first wife and debiting the expenses in a separate folio opened in the name of the charity, but it is not proved that he had actually set apart and appropriated any sum for the purpose as a trust fund. It is a common practice among Nattukottai Chettiars to make credit entries in their books of account in the names of various charities which they are conducting and debit the expenses in the same account, but it has been repeatedly held that such credit entries are not sufficient to create a trust unless corresponding sums are actually set apart and appropriated to the charities (*Vide Ramanathan* v. *Palaniappa*[1]). The mere fact, therefore, that the expenses relating to the construction of the building in question were debited in a folio headed "Chatram building account" cannot be taken as showing that such expenses came out of any trust fund so as to make the building the property of the trust. The evidence no doubt discloses an intention on the part of Palaniappa to devote the building when completed to the feeding charity which he was conducting, but this is far from showing that there was a completed dedication of the building while it was still under construction. The learned Advocate-General could not point to any particular time or occasion when such dedication could be said to have taken place. For all these reasons we cannot accept the suggestion that the building in question had been dedicated to the charity before Palaniappa died.

We are, however, inclined to agree with the appellant's contention that the building in its then unfinished state was devised under Palaniappa Chetty's will to the Annadhana Charity. The will is in Tamil and the official translation, quoted above, of the passage in italics is not quite accurate. A translation closer to the original would run thus :

"For the Annadhana chatram established at Nemathanpatti, besides the building which already exists, the building now under construction on the eastern side of the road and almost complete except for a small portion should be completed, and the said Annadhana Charity should be properly conducted from out of the said charity funds."

The point to be noted is that the words "For the Annadhana chatram established at Nemathanpatti," which occur at the beginning of the sentence can fairly and reasonably be taken to qualify not only the building already in existence but also the new building which was nearing completion. Thus construed, the passage taken along with the later passage which excepts "those buildings that have been ear-marked for the respective charities" from the scope of the power of alienation conferred on the executors, indicates in our view that the building in question, albeit unfinished at the time, was devised as a specific legacy to the Annadhana charity, the context making it clear that the testator intended that the charity should be

1. (1945) 2 M.L.J. 164 : I.L.R. (1945) Mad. 500.

conducted in that building when completed. We cannot agree with the learned Subordinate Judge that the discretion given to the executors to vary the *dittam*, or the established scale for the conduct of the charities shows that there was no binding obligation on the executors to carry on the charities and that the testator did not intend to divest himself and his heirs of the title to the property and to vest it in the executors as trustees for the charity. It will be seen that the testator, after directing the payment of his debts and bequeathing some pecuniary legacies, left the residue of his estate to the charities named in the will. It is thus clear that he did not intend that any portion of his estate should go to his sons whom he appointed executors under the will. Under these circumstances, the expression "private charity" used in the will can only mean, as suggested for the appellant, that the control and management was to continue in the testator's own family as provided for in the will, and it cannot be taken to imply that no real trust was intended to be created. The feeding of the poor is clearly a public charitable purpose, and we are of opinion that the will operates as a devise of the suit property to the executors in trust for that purpose.

The question next arises as to whether the property is on that ground not to be liable to answer the respondent's debt. It was urged for the appellant that the position was the same as if third parties had been appointed trustees for the charities under the will, in which case the executors, having completed the building after the death of the testator and fixed the stone inscription, must be taken to have assented to the legacy and handed over the subject of the legacy, *viz.*, the building, to the specific legatees so as to complete their title as against the executors. (*Vide* section 333 of the Indian Succession Act.) It was accordingly submitted that, though the respondent was entitled under section 361 of that Act to claim payment of his debt out of the property in the hands of the legatee, he could not proceed against the property by attachment and sale in execution of his decree made against the appellant as the legal representative, but only by a separate suit. We are of opinion that this contention cannot prevail. In the first place, it is not correct to say that the appellant stands in the position of a mere legatee. He is the executor of the will charged with the duty of administering the estate of the testator and carrying out the provisions of the will. The administration is not yet over, for the respondent's debt remains unpaid. The law casts upon an executor the obligation to discharge all the debts of the testator of which he has notice before paying or delivering the legacies bequeathed under the will (section 325 of the Indian Succession Act). The appellant was thus bound to pay, or to make provision for the payment of, the respondent's debt before carrying out the directions of the will in regard to the Annadhana charity. Pointing out the distinction between an unsatisfied creditor's right to proceed against the executor and his right to follow the assets already distributed to the legatees in order to obtain payment, Lord Davy observed in *Harrison* v. *Kirk*[1].

"In the first case he is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrine of the Court of Chancery, because he has no legal right against the legatees; he has no legal right against the residuary legatee; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of the Court or in Court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim."

(*Cf.* section 94, Ill. (a) of the Indian Trusts Act).

Can the "legal right" of an unsatisfied creditor to proceed against an asset of the testator in the hands of the executor be resisted by the latter on the plea that he holds it as a legatee whose title has been perfected by his own breach of duty, and that the creditor could only work out his equitable remedy in appropriate proceedings? We think not, for to admit of such a plea would be to allow a

1. (1904) A.C. 1 at p. 7.

wrong-doer to take advantage of his own wrong. It follows that the appellant, not having completed the administration of the estate and discharged the respondent's debt, must, in relation to the suit property, be deemed to be merely in the position of an executor, and the respondent is entitled to levy execution against the property under the decree obtained by him.

Furthermore, even if the respondent's claim against the appellant were to be regarded as based on the equitable right of an unpaid creditor to follow the assets in the hands of a legatee who has received the legacy, we can see no reason why the right should not be exercised by the respondent, in the circumstances of this case, by executing his decree. It has no doubt been held in *Jaychandra Ray* v. *Satishchandra Ray*[1], where the legatee was a third party (the shebait of a temple) that such right can be exercised only by a suit and not by levying execution under a judgment against the legal representative. It is unnecessary to make any pronouncement on that question for the purposes of this appeal as we are of opinion that it can have no application to the facts of the present case. Here the appellant was a party to the suit and to the decree made therein, and, being the executor as well as a satisfied legatee as he claims to be, must be deemed to have litigated in both capacities, and, his title in either case having been derived under the same will, whatever pleas were available to him in the one capacity or the other must be deemed to have been concluded by the decree. It is to be noted that the will does not nominate the appellant as the trustee of the charities but charges him as executor to carry out all the directions contained therein including those relating to the conduct of the charities. In such circumstances it would as it seems to us, be carrying technicality to the verge of absurdity to hold that the respondent must bring another suit against the appellant to enforce his right under section 381 of the Indian Succession Act. There seems to be no warrant in the section for the view suggested for the appellant that the right under it can be enforced only by means of a general administration action.

Two further points have been raised on behalf of the respondent in bar of the appellant's suit. One is that the suit is barred under section 47 of the Civil Procedure Code. The appellant, it is said, was a party to the suit and that the objection put forward by him to the attachment of the suit property falls to be determined under section 47 as a question relating to the execution, discharge or satisfaction of the decree and not by a separate suit. The appellant, however, insists that a differentiation should be made between his capacity as executor and his capacity as the specific legatee of the property in question in trust for the Annadhana charity, and that accordingly his claim on behalf of the charity must be regarded as falling under Order 21, rule 58, and, the claim having been negatived, the present suit to establish the right of the charity is maintainable under rule 63 of that order. If, as we have already observed, the appellant must be taken, in the circumstances of this case, to have litigated in both capacities in the suit, there is no room for such differentiation being made in the course of the execution proceedings. Reliance was placed on the Full Bench decision of this Court in *Ramanathan Chettiar* v. *Levvai Marakayar*[2], where it was held that a claim made by a person as a trustee on behalf of a charity for release of trust property from attachment in execution of a decree obtained against him in his individual capacity did not fall under section 244 of the old Code corresponding to section 47 but had to be dealt with under section 278 corresponding to Order 21, rule 58 of the present Code. There the judgment-debtor was a trustee under an independent right which was in no manner connected with the transaction which led to the personal decree passed against them. The circumstances here, as we have indicated, are quite different and the case has no application. The respondent's objection to the maintainability of the suit must therefore prevail.

1. (1930) I.L.R. 58 Cal. 170. (F.B.).
2. (1899) 10 M.L.J. 64 : I.L.R. 23 Mad. 195

The other plea in bar is based upon the lack of pecuniary jurisdiction in the trial Court to entertain the suit. The appellant has valued the property in question, which has admittedly cost more than a lakh of rupees to build, at only Rs. 1,000 on the plea that the property has no market value as it belongs to a charity and is inalienable. This view was accepted by the trial Court which accordingly entertained the suit, but was rejected by the Subordinate Judge who has held that the suit having been deliberately undervalued and the valuation not having been amended on objection raised by the respondent was liable to be dismissed for want of jurisdiction also. The learned Judge has however, overlooked the provisions of section 11 of the Suits Valuation Act. Sub-section (2) of that section clearly provides that even where objection to want of jurisdiction was taken in the Court of first instance at or before the first hearing, the appellate Court should not entertain the objection unless it is satisfied for reasons to be recorded by it in writing that the undervaluation has prejudicially affected the disposal of the suit on its merits. Otherwise, the appellate Court, if it has before it the materials necessary for the determination of the other grounds of appeal to itself, is required to dispose of the appeal, " as if there had been no defect of jurisdiction in the Court of first instance. . . . ." The learned Subordinate Judge has not considered the question from this point of view. The respondent's learned Counsel has not attempted to show how the undervaluation, assuming that the suit was undervalued, has prejudicially affected the disposal of the suit on its merits. The objection, therefore, on the ground of undervaluation should not have been entertained.

In the result, the appeal fails and is dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Rao Sahib P. V. Rangayya .. *Petitioner**

v.

Tatavarty Nagapotha Rao and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 46, 49 and Section 52—Applicability—Partnership—Death of partner—Suit on promissory note by—Decree against legal representatives—Decree against assets of deceased partner—Mode of enforcing—Special procedure under rule 49 if available—Interference in revision.

M who was a partner in *M & Co.* died in February, 1937. The business was continued by the surviving partner *R* in the name of *M & Co.* In 1938 a third person sued on a promissory note executed by the deceased and obtained a decree in 1939 against the legal representatives of *M*, the decree being against the assets of *M* in their hands. In execution of the decree the decree-holder applied under Order 21, rules 46 and 49, Civil Procedure Code, for the attachment of the assets belonging to the deceased *M* in the partnership. The Court ultimately directed that the surviving partner should deposit into Court the amount claimed in the execution petition in satisfaction of the charge on the profits in his hands created under Order 21, rule 49 of the Code. Against the said order a revision petition was preferred to the High Court.

Held, that the special procedure prescribed by Order 21, rule 49 was not applicable to the case, because, there was no partnership in existence as such at the time of the suit or at the time of the application for execution, and that the remedy of the decree-holder was to proceed under Section 52 of the Code.

Held further, that the revision petition was maintainable even though the petitioner might also have the remedy by way of suit to set aside the order under rule 49 of Order 21 of the Code.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Masulipatam, dated 10th May, 1944 and made in E.P. No. 299 of 1940 in O.S. No. 546 of 1938.

K. Subba Rao for Petitioner.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—H. W. Maidan who was a partner in Maidan and Co., died in February, 1937. The business was continued by the surviving partner Rao

---

* C. R. P. No. 948 of 1944. 9th October, 1945.

Sahib P. V. Rangiah, who is the petitioner here, in the name of Maidan and Co. Jaldu Venkatasubba Rao obtained a decree in O.S. No. 546 of 1938, District Munsiff's Court, Masulipatam, against the legal representatives of the aforesaid Maidan, the decree being against the assets of Maidan in their hands. The decree was passed on 9th June, 1939. In execution of the decree the decreeholder applied under Order 21, rule 46 and under Order 21, rule 49 for the attachment of the assets belonging to the deceased Maidan in the partnership. The procedure prescribed in rule 49 of Order 21 was followed and ultimately after the appointment of a receiver, examination of accounts and the determination of the value of the share in the goodwill of the business that belonged to Maidan, the Court below directed that the surviving partner who was the objector, should deposit in Court the amount claimed in the execution petition in satisfaction of the charge on the profits in his hands created under Order 21, rule 49. This petition is to revise that order.

In the meantime in the course of the proceedings taken under Order 21, rule 49, orders were passed for the production of accounts and an appeal taken against the said order was rejected in October, 1941, on the ground *inter alia* that no appeal lay. The appellate Court, however, gave some directions as to the lines on which further enquiry should be conducted in the matter and pursuant to the same, the District Munsiff passed a further order on 5th October, 1943, which was of a preliminary nature directing the receiver to conduct the examination of the accounts for the purpose of answering certain specific questions that were formulated. The receiver submitted a report after giving an opportunity to both sides and ultimately the order which is now sought to be revised was passed by the District Munsiff.

A preliminary objection has been taken by Mr. Raghava Rao for the respondents as to the maintainability of the petition. It is urged that a remedy by way of a regular suit was available to the petitioner against the order made by the lower Court under Order 21, rules 46 and 49 and that consequently a revision ought not to be allowed. The contention is that the processes prescribed in rules 46 and 49 of Order 21 are different modes of attachment laid down under the Code for different kinds of property, that rules 41 to 57 deal with such different kinds of attachment and that rule 58 provides for claim being made to properties so attached or objections being taken to the respective kinds of attachment enumerated in the earler rules including rules 46 and 49. He therefore contends that there being a right under rule 58 for the party aggrieved to put forward a claim or an objection, a right of instituting a suit under rule 63 of Order 21 is available in the event of the claim being defeated and without exercising those rights it was not open to the petitioner to pursue the remedy by way of revision. This objection does not appear to be sound for various reasons. To start with I am not certain if Order 21, rule 63 has any application to a case of this description. That rule follows upon rule 58 and under rule 58 what is required is that there should have been an attachment of property and on the ground that such property is not available to such attachment a claim is preferred to the property attached or objection is made to the attachment. The underlying fact is that there was an attachment of property in execution of a decree. No doubt, rule 46 of Order 21 specifically contemplates attachment. But is is difficult to hold on the language of rule 49 that there is anything in the nature of actual attachment. What the rule actually provides appears to be a process in substitution of the ordinary process of attachment. Under sub-rule 2 of that rule the Court makes first what is called a charging order charging the interest of the partner who is the judgment debtor in the partnership property and the profits with payment of the amount due under the decree. Subsequently another order is made appointing a receiver of the share of such partner in the profits and of other moneys which may be coming to him in respect of the patnership. Thirdly, the Court may issue directions for the taking of accounts and making all inquiries and lastly the Court may make an order for the sale of such

interest. In addition to these specific orders the Court may make such further orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner or such further orders as the circumstances of the case may require. It is thus clear that at no stage does sub-rule 2 contemplate the levying of an attachment of property such as would amount to an attachment within the meaning of rule 58 for the purpose of entitling the person aggrieved to prefer a claim or an objection. Turning to rule 46 of Order 21, I have already stated that that rule expressly contemplates an attachment but even with reference to that rule, it has been held that where the garnishee denies the existence of the debt, the provisions contained in rules 58 and 63 of Order 21 do not apply—*Butchayya* v. *Krishnamachari*[1]. It must be pointed out that the learned Judges in that case took this view in spite of the Full Bench decision in *Chidambara Patter* v. *Ramaswami Patter*[2], distinguishing the Full Bench case on the ground that in that case the question was not whether when the existence of the debt is itself denied, the denial of the garnishee can be considered to be a claim or objection under Order 21, rule 58. Besides this aspect of the matter, the remedy by way of revision can be denied only if the alternative remedy is certain and conclusive and not ambiguous. It would appear that in this case *ex majore cautela*, the petitioner has adopted the other remedy of instituting the suit; but in that suit the respondent has as defendant raised the contention that the suit itself is not maintainable. That is only by the way. In any view of the matter if the Court should be of the opinion that the Court below had no jurisdiction under Order 21, rule 49 to make the order complained against, even if there was some other remedy open to the person aggrieved, it would in my opinion be proper for this Court to interfere. A similar argument that when there was a remedy by suit open, revision should not be allowed was repelled by a Division Bench of this Court in *Official Receiver, Guntur* v. *Seshayya*[3]. It was pointed out by the learned Judges there that it has never been held by this Court that because the petitioner has a remedy by way of a suit, therefore this Court has no power to interfere by way of revision. Cases in which this Court has interfered in revision in spite of the fact that the petitioner has another remedy are, it was there observed, too numerous to be quoted. For these reasons, I overrule the preliminary objection raised by Mr. Raghava Rao.

Going to the merits of the case, the first contention put forward by Mr. Subba Rao is that Order 21, rule 49 has no application to the case because in the present case there was no partnership in existence as such at the time of the suit or at the time of the application for execution. As stated before, Maidan died in 1937, and the suit itself was filed in 1938, the decree therein having been passed in 1939. With the death of Maidan, the partnership consisting of himself and Rao Sahib P. V. Rangiah became dissolved and no fresh partnership was formed. The legal representatives of the deceased Maidan did not come into the partnership. Rule 49 of Order 21, does not apply to the case of a dissolved partnership. Sub-rule 1 says that property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners as such. Admittedly in the present case the decree in O. S. No. 546 of 1938 was not passed against the firm of Maidan and Co., or against a partner of the firm as such. The suit was on a promissory note executed by Maidan in his individual capacity and the decree was passed against his assets in the hands of his legal representatives.

The subsequent provisions of rule 49 are clearly confined to the case mentioned in sub-rule 1. By sub-rule 2 the Court may on the application of the holder of a decree *against a partner* make an order charging the interest *of such partner*, the expressions "a partner" and "such partner" meaning obviously a partner in the firm as such. Later the rule refers to the appointment of a receiver of the share *of such partner* in the profits and also of any other money which may be coming to him *in respect of the partnership*, and further on, the rule states that the Court might make

1. (1935) 70 M.L.J. 20 : I.L.R. 59 Mad. 966. 67 (F.B.).
2. (1903) 13 M.L.J. 467 : I.L.R. 27 Mad. 3. (1940) 2 M.L.J. 860.

such other order as might have been directed or made if the charge had been made in favour of such decree-holder as partner. Under sub-rule 4 every application for an order under sub-rule 2 shall be served on the judgment-debtor and on his partners or such of them as are within British India. The entire scheme of this rule therefore is based upon the concept that there is a partnership in existence at the time when the process was sought to be taken out or that the decree which is sought to be executed was made against the partners in the firm as such ; *i.e.*, the persons should bear the character of partners in the firm at the time. The principle underlying this rule as stated by Mr. Subba Rao is to prevent as far as possible the disturbing or dislocation of the working of a continuing partnership. The principle itself would cease to apply as also the respective provisions of the rule in the case of a defunct or dissolved partnership. To this objection Mr. Raghava Rao has hardly any answer. All that is stated is that this rule should be read with section 52 (1) of the Civil Procedure Code. That section provides that where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property. To such a course the petitioner has and can have no valid objection. In fact the decree is against the property of the deceased, if any, in the hands of his legal representatives. What the petitioner objects to is the setting in motion of the special machinery provided in rule 49 which leaves him without any remedy whatever by way of appeal or perhaps by way of a separate suit. Section 52 is of a general nature which applies to all cases where a decree is sought to be executed in respect of a debt due by a deceased person against his representatives in interest. But rule 49 of Order 21, is in the nature of a special rule covering a special class of cases, *viz.*, decrees passed against firms or against partners in the firm as such. With regard to such decrees it is open to the Court to execute the decree in the special manner prescribed by the rule. Where the fundamentals of the rule are not satisfied, it is clearly outside the province of the Court to invoke the aid of the said rule.

At this stage in answer to this particular objection Mr. Rahgava Rao raised another preliminary contention, *viz.*, that the petitioner should have come up to this Court at a much earlier stage to get the prior orders passed in this matter revised and that his failure to do so would preclude him from seeking to get the present order revised. I have indicated the various orders passed in the earlier stages of the proceedings and from a perusal of those orders, it is clear that none of them was of a definitive or conclusive nature. It is not as though the petitioner raised this objection for the first time at this stage. I find that in the counter filed by him on 30th April, 1940, to the execution petition, he raised the plea that Maidan having died in 1937 the partnership became dissolved and there was no share of Maidan which could be charged with the decree amount in the case. When he was directed to produce the accounts by the District Munsiff's order dated the 5th July, 1941, he objected and he carried the matter in appeal. The appellate Court held that no appeal lay, but gave some directions for further enquiry. While the enquiry was pending it was not open or necessary for the petitioner to invoke the revisional jurisdiction of this Court. The enquiry was completed and the receiver submitted his report and when the order was passed by the Court in pursuance of the receiver's report making specific directions for the production of the required amount into Court, that was the appropriate stage at which he could invoke the revisional jurisdiction of this Court.

Besides this main contention, Mr. Subba Rao has raised two other objections to the order under revision, but since I agree with him with regard to this main plea and I am not impressed with the other two arguments, it is unnecessary for me to examine them. In the result the petition is allowed and the order of the lower Court is set aside. Execution cannot proceed against the petitioner under rule 49. But the attachment made under Order 21, rule 46 will subsist. The petitioner will get his costs from the respondent in this Court.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PATANJALI SASTRI AND MR. JUSTICE KOMAN.

Puthukuzhi Neelakantam Nambisan's son Karnavan Sankaran Nambisan .. *Appellant**

v.

Koottal Manikkam Devaswam Utama Manikkam Keralan Thachutayya Kaimal Avergal .. *Respondent.*

Madras Agriculturists' Relief Act (IV of 1938), section 20, Proviso—Applicability—Court executing decree also the Court which passed it—Section 20 not inapplicable and if stay is ordered scaling down application must be made within sixty days—Stay obtained by junior member of Hindu joint family—Manager cannot apply beyond sixty days of stay order for scaling down.

It cannot be said that section 20 of the Madras Act (IV of 1938) has no application to a case where the Court executing the decree was also the Court which passed the decree and that an application for stay made and ordered under that section must be ignored. Where stay has been ordered in such a case the proviso to the section is attracted so as to make it incumbent on the judgment-debtor to file an application for relief under section 19 within sixty days of the stay order.

Any member of a Hindu joint family in the case of a family debt has the power to apply for relief under the Act and as ancillary thereto for stay under section 20 and any stay order obtained by him would operate to bar an application for relief made by the manager beyond sixty days of such order.

Appeal against the order of the Court of the Subordinate Judge, Ottapalam, dated 1st July, 1944, in E. A. No. 264 of 1944 in O. S. No. 46 of 1932.

D. A. Krishna Variar and *D. H. Nambudripad* for Appellant.

P. Govinda Menon for Respondent.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This appeal arises out of an application under section 19 of the Madras Agriculturists' Relief Act, 1938, to scale down the decree passed in O. S. No. 46 of 1932 on the file of the Subordinate Judge's Court of Ottapalam.

The decree was passed upon a hypothecation bond executed by defendants 1 to 4 who were members of a tarwad governed by ordinary Hindu Law. Defendants 1 to 3 are brothers and the fourth defendant is the son of the first defendant. The mortgaged properties having been sold, a personal decree for the balance remaining due on the hypothecation was passed on 27th January, 1938. Certain properties belonging to the family which had already been attached were sought to be sold in execution of this decree. At that stage the fourth defendant filed an application (E. A. No. 878 of 1940) under section 20 of the Act for stay of execution, and stay was ordered. But the fourth defendant did not file any application for scaling down the decree under section 19 within sixty days thereafter. The first defendant who is the manager of the family applied again for a stay of execution in E. A. No. 1055 of 1943 on 20th December, 1943. This petition was dismissed so far as the properties of the tarwad were concerned, but stay was ordered as regards the first defendant's personal liability under the decree. The first defendant then filed the present application as the karnavan of the tarwad for scaling down the decree under section 19 of the Act. This application was dismissed as barred by time under the proviso to section 20. Hence this appeal.

The question of bar under section 20 arises not with reference to the stay obtained by the first defendant in E. A. No. 1055 of 1943, for the present application under section 19 was admittedly filed within sixty days of the order of stay, but with reference to the stay obtained by the fourth defendant in his earlier application for stay E. A. No. 878 of 1940 which, as we have already stated, was allowed. It is argued for the appellant (first defendant) that inasmuch as the Court which was executing the decree was also the Court which passed the decree, section 20 had no application to this case, that therefore the application made by the fourth defendant under that section for stay should be ignored and that as this Court has held in *Kumaraswami* v. *Thiruvengadathan*[1] that apart from the period prescribed

---

* A. A. O. No. 480 of 1944. 8th October, 1945.

1. (1939) 2 M.L.J. 308 : I.L.R. (1939) Mad. 886.

under the proviso to section 20, there is no period of limitation for making an application under section 19, the present application should not have been dismissed as barred by time. We are unable to accept this contention. There is nothing in section 20 of the Act as we read it to warrant the distinction sought to be made on behalf of the appellant between an execution-proceeding taken in a Court which passed the decree and a similar proceeding taken in a Court other than the one which passed the decree. In both cases applications for stay can be made under section 20 and if a stay is ordered, then the proviso to the section is attracted so as to make it incumbent upon the judgment-debtor to file an application for relief under section 19 within sixty days of the stay order.

It was next urged that the fourth defendant who is only a junior member of the tarwad had no authority to make an application on behalf of the tarwad under section 20 and any stay order obtained by him could not operate to bar an application made by the karnavan under section 19 even though the latter application was filed beyond sixty days of such order. It is no doubt true that a junior member of a Hindu joint family cannot act so as to bind the family as a whole by the consequences of his Act. But section 19 of the Act expressly empowers, in the case of a debt due by a joint Hindu family, any member of the family whether or not he is the judgment-debtor to apply for relief under that section, and as the relief of stay under section 20 is only ancillary to the application for the relief obtainable under section 19, it must follow that any member of a joint family in the case of a family debt must also have the power to apply for stay under section 20. We are therefore of opinion that although the fourth defendant was not the karnavan or the manager of the family, the consequence of his obtaining the stay order under section 20 in E. A. No. 878 of 1940 was to make the period of limitation provided in section 20 applicable to the present application made by the first defendant as the manager or karnavan of the family. This contention therefore must also be rejected.

In the result the appeal fails and is dismissed with costs.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Anne Venkatasubba Rao .. *Petitioner**

v.

Anne Bhujangayya and another .. *Respondents.*

Court-Fees Act (VII of 1870), Schedule II, Articles 1 and 18—Application under section 33, Arbitration Act, to set aside award—Court-fee payable—Fiscal legislation—Strict construction.

An application under section 33 of the Arbitration Act praying that an award should be set aside is leviable to a court-fee of annas twelve under Article 1 of Schedule II of the Court-Fees Act.

A fiscal enactment, such as the Court Fees Act, must be strictly construed and where there is any doubt the benefit of it should be given to the tax-payer.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Guntur, dated 29th March, 1945, in unregistered I. A. No.——of 1945, in O. P. No. 8 of 1945.

V. Rangachari for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the respondent in certain arbitration proceedings at the conclusion of which he desired to set aside the award which presumably had been made against him. He therefore filed an application under section 33 of the Arbitration Act, 1940, praying that the award should be set aside. He filed it as an ordinary application or petition and paid in accordance with Article 1 (*b*) of Schedule II of the Madras Court-Fees (Amendment) Act, a fee of twelve annas.

* C. R. P. No. 602 of 1945. 26th October, 1945.

Objection was raised by the authorities to this fee and the Subordinate Judge of Guntur in whose Court the proceedings took place made an order on the 29th March, 1945, that the applicant should pay a court-fee of Rs. 100. Hence this petition.

In his order the learned Judge dealt with the points made by the petitioner's counsel and agreed with him that Article 18, Schedule II of the Court-Fees Act which prescribes a fee of Rs. 100 in certain circumstances applies only to applications made under paragraphs 17 and 20 of Schedule II of the Civil Procedure Code, which have been repealed by the Arbitration Act and are now represented approximately by sections 14 (2) and 20 of that Act. Paragraphs 17 and 20 like sections 14 and 20 do not in any way deal with applications to set aside an award. No specific provision, as the learned Subordinate Judge agrees, is made in the Court-Fees Act for such applications. The learned Subordinate Judge, however, felt that an application to file an award under section 31 was akin to matters provided for in section 20, namely, an application to file an arbitration agreement in Court and therefore that a similar fee should be payable. He thought that an application to set aside an award would be an independent application for an independent relief and that as such the same court-fee should be payable as on an application to file an award.

It is an old principle of fiscal legislation that it must be strictly construed and that where there is any doubt, the benefit of it should be given to the tax-payer. The learned Government Pleader agrees that this is the true position with regard to such legislation. There is no doubt that this particular application is not provided for in the Court-Fees Act. The application in question has to be brought under some existing provision and all that can be done is to use the general article, namely, Article 1. The Court-fee paid therefore, namely twelve annas, was correct and the order of the Subordinate Judge must be set aside.

Only the Government appears as respondent; there will therefore be no order as to costs.

B.V.V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CHANDRASEKHARA AIYAR.

Thambi Iyengar and others .. *Petitioners**

Madras Gaming Act (III of 1930), sections 5 and 6—Warrant issued under section 5—Contents—Presumption under section 6, depends on proper compliance with terms of section 5—Absence of proof of house being used for profit or gain—Convictions—Sustainability.

It is desirable that officers who issue warrants under section 5 of the Gaming Act take good care to employ the language of the section in the warrants, provided, of course, they are satisfied on information received by them, that any place falls within the definition of a "common gaming house" within the Act.

It is only if there is a proper compliance with the terms of section 5 that the presumption under section 6 will apply. In the absence of proof by specific evidence that a house was used for profit or gain of the person owning or occupying it, the presumption under section 6 does not arise and the convictions under the Act cannot be sustained.

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Kumbakonam, in C. A. No. 12 of 1945 dated 23rd April, 1945, preferred against the order of the Court of the Stationary Second Class Magistrate, Kumbakonam, in C. C. No. 1280 of 1944.

G. N. Chari for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

---

* Cr. R. C. No. 640 of 1945. 26th October, 1945.
(Cr. R. P. No. 598 of 1945).

The Court made the following

ORDER.—Only a technical objection has been taken to the correctness of the convictions in this case under the Gaming Act, but I am afraid the objection has to be allowed. The warrant issued under section 5 does not set out that the Deputy Superintendent of Police, who issued it, had reason to believe that the house in question was being used as a " common gaming house." All that it states is that information had been laid before him that gambling was going on in house No. 67, Iyengar Street. It is only if there is a proper compliance with the terms of section 5 that the presumption under section 6 will apply. As a matter of fact, there is no proof in this case, apart from the presumption that can be raised under section 6, that the house was used for the profit or gain of the person owning or occupying it. In the circumstances, the presumption does not arise and, in the absence of specific evidence, the convictions have to be set aside.

It is desirable that officers who issue warrants under section 5 of the Gaming Act take good care to employ the language of the section in the warrants, provided, of course, they are satisfied on information received by them, that any place falls within the definition of " a common gaming house " within the Act.

The convictions and the sentences are set aside. The fines, if paid, will be refunded. The cash (M. O. 3) seized from the first accused will be given back to him.

V.S. *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Nalluri Rangacharyulu .. *Petitioner**

v.

Kondamadugula Vajjala Reddi and another .. *Respondents.*

Jurisdiction—Value of suit for purposes of—Subject-matter of plaint related to things which have a real money value.

Where the prayer in a plaint was to declare the orders of the trustee and the Hindu Religious Endowments Board regarding the dismissal of the plaintiff as *ultra vires* and illegal and that hence they did not affect the right of plaintiff to the office of archaka in the suit temple,

Held, that on a general reading of the whole plaint, the prayer amounted in substance to asking for a restoration of the plaintiff to the archaka's office and not merely for a declaration and as the subject-matter of the plaint was so related to things which have a real money value, the value of the suit for purposes of jurisdiction must be taken as the market value of the property affected.

Vasireddi Veeramma v. *Butchayya*, (1926) 52 M.L.J. 381 : I.L.R. 50 Mad. 646 and *Dalrus Banoo Begam* v. *Nawab Sayeed Asgur Ali Khan*, (1875) 23 W.R. (Civil) 453, referred to.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Guntur, dated 6th April, 1944, in C. M. A. No. 138 of 1943, preferred against the order of the Court of the District Munsiff of Guntur (Principal) dated 15th November, 1943, in O. S. No. 178 of 1943, etc.

K. Kameswara Rao for Petitioner.

M. Seshachalapathi and *P. Chandra Reddi* for Respondents.

The Court delivered the following

JUDGMENT.—The question that is common to both these petitions is whether the prayer asked for in the plaints in O.S. Nos. 178 and 179 of 1943, on the file of the District Munsiff's Court, Guntur, amounted really to asking for a declaration that the orders complained of were *ultra vires* and illegal or whether they amounted to asking also for a restoration of the respective plaintiffs to the archaka's office.

It is conceded by the learned counsel for the petitioners that for ascertaining this the mere form of the prayer will not be looked into but the substance thereof. In the plaint in O.S. No. 178 the prayer is for a declaration that the order dated

---

* C. R. Ps. Nos. 1102 and 1103 of 1944. 19th September, 1945.

18th December, 1940, by the trustee and the order dated 12th July, 1942, of the Hindu Religious Endowments Board regarding the plaintiff's dismissal are *ultra vires* of their powers and wholly illegal, unjust and void and hence do not affect the right of the plaintiff to the office of archaka in the suit temple. This idea of a declaration to the effect that the order does not affect the plaintiff's right to the archaka's office was also mentioned specifically in the same terms in paragraph III 6 (*f*) of the plaint as also in paragraph V. Likewise in the plaint in O.S. No. 179 of 1943, the prayer is for a declaration couched in the same terms and that part of it which seeks for declaration that the plaintiff's right to the office of archaka is not affected, is repeated in two other places.

It is argued by Mr. Kameswara Rao that what the plaintiff intended to ask for was only a bare declaration concerning the illegal and *ultra vires* nature of the orders in question and that he did not intend to ask for his restoration to the office. The general reading of the plaints and the particular form in which the declaration has been asked for does not however support this contention. Holding then that in substance both the plaints prayed for the plaintiffs' restoration to the archaka's office, the question in whether the order of the lower Court returning the plaints for presentation to the proper Court is correct.

In *Vasireddi Veeramma* v. *Butchayya*,[1] it was held that where the subject-matter is so related to things which have a real money value that the relief asked for will affect these, then the value of the suit for the purpose of jurisdiction is to be taken as the market value of the property affected. In *Dalrus Banoo Begum* v. *Nawab Sayeed Asgur Ali Khan*,[2] the learned Judges observed :

> "They (the plaintiffs) ask not only that the defendant may be declared to have wasted the endowment and thereby to have betrayed her trust, but also that she may be turned out of her Mutavalleeship and they, the plaintiffs, be appointed in her room. The plaintiffs say that what they claim does not admit of being properly estimated by a money value, but this is not so. Under the towleutnamah mutavallees were to receive six twenty-eighths of the produce of the estate, a very considerable sum; and the plaintiffs' claim to this suit as an appurtenance to the office of mutavallee was easily to be estimated in money."

In the second plaint, the averment was made that the plaintiff's father had a two-third share in the archakathwam and as a result of a family partition, the plaintiff became entitled to two-ninth share in the same and that as per the established usage of the temple, plaintiff was getting his term of service performed by his brother since 1938 on an undertaking that the said Srinivasacharyulu should enjoy his share of income also in the inam for a term of five years and perform his terms of service during that period. There is therefore a direct reference to the emoluments and profits of the office. Having regard to the rulings cited above and the various recitals in the respective plaints and the declaration asked for and the relation that exists between the office and the emoluments attached thereto, I am inclined to agree with the view taken by the Courts below. Both the civil revision petitions are dismissed. Full costs in C.R.P. No. 1102 of 1944. No costs in C.R.P. No. 1103 of 1944.

V.P.S. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

S. R. Viraraghava Aiyangar .. *Petitioner.**

Madras Essential Articles Restricted Acquisition Order (1943), section 3 (1)—Acquisition prior to order coming into force—Transportation into a locality after the order had come into force there—No offence made out under section 3 (1).

The Madras Essential Articles Restricted Acquisition Order came into force in the Kumbakonam Municipality on 14th March, 1944. A person who had prior to that date bought certain paddy

---

1. (1926) 52 M.L.J. 381 : I.L.R. 50 Mad. 646. 2. (1875) 23 W.R. (Civil) 453 at 455.

* Cr. R. C. No. 459 of 1945. 26th October, 1945.
(Cr. R. P. No. 422 of 1945).

at Perambur in Tanjore taluk but brought the same into Kumbakonam on 2nd April, 1944, after the order had come into force in that Municipality was prosecuted and convicted for an offence under section 3 (1) of the Order. In revision,

Held, that as there was no acquisition of the paddy in question after the order had come into force in Kumbakonam, there could be no conviction for an offence under section 3 (1) of that Order. The word "acquired" in that section cannot be taken to mean "transported" so as to make the removing of the paddy to Kumbakonam an offence under the section.

Petition under sections 435 and 439, Criminal Procedure Code, praying that the High Court will be pleased to revise the judgment of the Court of the First Class Sub-Divisional Magistrate, Kumbakonam, dated 31st January, 1945, in C.A. No. 4 of 1945, C.C. No. 1253 of 1944, Stationary Sub-Magistarte's Court, Kumbakonam.

M. S. Venkatarama Aiyar for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The petitioner was prosecuted for having committed an offence under section 3 (1) of the Madras Essential Articles Restricted Acquisition Order, 1943. This order came into force in the Kumbakonam municipality on 14th March, 1944. When the Rationing Officer tried to get a statement from the accused as to how much of paddy he had in his house for his use, he learnt that certain paddy had been brought from Perambur in Tanjore taluk. The paddy was brought from Perambur to Kumbakonam on 2nd April, 1944, after the date on which this order came into force in Kumbakonam. The petitioner admitted these facts and he was accordingly convicted. What is urged is that it is only an *acquisition* subsequent to the date on which the order came into force that would amount to an offence and that no such acquisition had been made by the petitioner.

On the facts there is no dispute. There is evidence to show that the petitioner purchased the paddy at Perambur early in March, and kept it in his son-in-law's house and there was delay in transporting it to Kumbakonam as he could not find facilities for such transportation. Under section 3 (1) "no person shall, except under the authority of a licence granted by an officer authorised by the Provincial Government in this behalf, *acquire* any essential article if by so doing the quantity thereof in his possession or under his control will exceed the normal quantity required by him." There is absolutely no evidence to show that this additional paddy was acquired by him after the date on which the order came into force in Kumbakonam. If by acquisition is meant getting possession of the goods or proprietary right over goods, then it was done earlier than the date on which the order came into force as the acquisition was early in March itself. What is urged by the prosecution is that the word "acquired" should be taken to mean "removing", the property to Kumbakonam. I do not think the word "acquired" can be taken to mean "transported". The word "acquire" is not defined in the order; according to the Concise Oxford Dictionary, it means "gain by oneself and for oneself; come into possession of". The petitioner came into possession of the property early in March itself when he purchased the paddy. Therefore there was no acquisition subsequent to the date on which the order came into force in Kumbakonam. There are other provisions of law under which such transport is prevented, but he is not prosecuted for any such offence. He has been prosecuted only for an improper acquisition of the property subsequent to particular date. The acquisition was prior to that date. Therefore the conviction has to be set aside.

The conviction and sentence are set aside—the petitioner is acquitted. The fines, if already paid, will be refunded.

K.C. ——— *Convicton set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Valmiganathan .. *Petitioner**

Madras District Municipalities Act (V of 1920), section 359 and Penal Code (XLV of 1860), section 323—Obstruction to municipal servant in the discharge of his duties and causing of hurt to him in the course of the obstruction—Separate charges under section 359 of the District Municipalities Act and section 323 of the Penal Code—Legality—Conviction on both—Propriety.

Where a person obstructs a municipal servant in the discharge of his duties and hurt is caused to the latter in the course of the obstruction that was offered, there is no legal bar to such a person being charged separately for the two offences under section 359 of the District Municipalities Act and under section 323 of the Indian Penal Code because the one offence is not involved in the other.

In the circumstances, *held*, that when the Magistrate had made up his mind to proceed against the accused under section 323 of the Penal Code it would have been proper for him to have dropped the charge under section 359 of the District Municipalities Act.

Petition under sections 435 and 439 Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Sub-Divisional Magistrate of Kumbakonam, dated 12th Frbruary, 1945 in C.A. No. 1 of 1945 (C. C. No. 861 of 1944, Stationary Sub-Magistrate, Kumbakonam).

M. Srinivasagopalan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—Two objections are taken to the conviction in this case. One is that when the accused was charged under section 359 of the District Municipalities Act and fined Rs. 10 for obstructing a Municipal servant in the discharge of his duty, the other charge under section 323 of the Indian Penal Code for hurt caused to P. W. 1 does not lie. I do not agree. The one offence is not involved in the other; and, if in the course of the obstruction that is offered, hurt is caused, the accused can be charged separately for the two offences. I however think that, having made up his mind to proceed against the accused under section 323, it would have been proper for the Magistrate to have dropped the charge under section 359, in circumstances of this case. For this reason, and not because on any ground of impropriety or illegality, I set aside the conviction and the sentence under section 359 of the District Municipalities Act.

It is argued on the strength of the decision in In re *Rajaratnam Pillai*[1] of King, J., that it was not open to the Magistrate to proceed against the accused on a charge under section 323 of the Indian Penal Code when information was laid before him only for an offence under section 359 of the District Municipalities Act. This objection is not well-founded. So far as I am able to see, there is no legal bar. What appears to have happened in the case before King, J., is that the Magistrate not only took cognizance of the case as involving an offence under the Railways Act but proceeded with the trial of the case under the procedure laid down for the trial of summons cases and after taking the evidence for the prosecution in full, he converted the proceedings before him from a summons case into a warrant case. That is not what took place here. From the very commencement there was a charge against the accused under section 323 of the Indian Penal Code and he was tried under the warrant procedure. The conviction under section 323 of the Indian Penal Code will stand, but I reduce the fine to Rs. 20. Any excess, if paid, will be refunded.

V.S. ——— *Fine reduced.*

---

* Cr. R. C. No. 620 of 1945. (Cr. R. P. No. 578 of 1945). 30th October, 1945.

1. (1936) 70 M.L.J. 340 : I.L.R. 59 Mad. 442.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Divi Seshacharyulu .. *Petitioner**

v.

Divi Lakshminarayanacharyulu and others .. *Respondents.*

Pleadings—Amendment of plaint—New cause of action sought to be introduced—Alteration in nature and complexion of suit—Suit for possession of partitioned property—Alternative case on footing of parties being joint—Whether can be brought in by amendment.

The plaintiff and the first defendant, who was his elder brother, originally constituted a joint family and became subsequently divided. The plaintiff's case was that although the partition took place in 1928 some partition lists were prepared in April, 1930, and that the properties which fell to his share were entrusted by him to the first defendant for management under an arrangement whereby the first defendant was to collect rents and deliver the same to the plaintiff at his place. It was also his case that in pursuance of the arrangement rents were delivered for three years but that subsequently the first defendant committed default and some time later he gifted away to his daughter the second defendant all the items of property that fell in the partition to the plaintiff's share. The prayer in the plaint was for possession of those lands after evicting the first and second defendants and their representatives therefrom and also for past and future mesne profits. In an application for amendment of the plaint it was sought to add certain new paragraphs to the plaint to substantiate the alternative prayer that in case it should be held that the alleged partition of 1928 was not valid and it became necessary to consider the parties as members of a joint family, the properties mentioned in the affidavit accompanying the petition should be partitioned and separate possession should be given to the plaintiff of his share. The trial Court having rejected the application for amendment, the plaintiff preferred a civil revision petition to the High Court.

Held, that the effect of the amendment sought was to alter the nature and complexion of the suit and the cause of the suit, and that the trial Court rightly refused to grant leave to the plaintiff to amend the plaint.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order and judgment of the Court of the District Munsiff, Masulipatam dated 27th November, 1944 and made in C. M. P. No. 1827 of 1944 in O. S. No. 408 of 1943.

P. Sivaramakrishnayya for Petitioner.

V. Rangachari for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff in O. S. No. 408 of 1943 on the file of the District Munsiff of Masulipatam is the petitioner. He applied by C. M. P. No. 1827 of 1944 to amend the plaint and that application was refused by the District Munsiff and the present petition arises out of that order.

The first defendant is the elder brother of the plaintiff. They constituted a joint family, and it is agreed between the parties that they divided. The plaintiff's case is that the partition took place about 1928, while according to the defendant the plaintiff left the village as early as 1885 abandoning his share in the family property. Ever since, the first defendant has been in enjoyment of the entire property. At present we are not concerned with the details of the defendant's version. The plaintiff's case is that although the partition took place in 1928 some partition lists were prepared on 15th April, 1930, and that the properties which fell to his share were entrusted by him to the first defendant for management under an arrangement whereby the first defendant was to collect rents and deliver the same to the plaintiff at his place. It is also his case that in pursuance of this arrangement, for three years, rents were accordingly delivered but that subsequently the first defendant committed default, and sometime later he gifted away to his daughter, the second defendant, all the items of property that fell in the said partition to the plaintiff's share. The prayer in the plaint was for possession of those lands after evicting the first and second defendants and their representatives therefrom and also for past and future mesne profits. In the application for the amendment of the plaint it was sought to add certain new paragraphs to the plaint to substantiate an alternative prayer that in case it should be held that the alleged partition of

* C. R. P. No. 1795 of 1944. 21st September, 1945.

1928 was not valid and it became necessary to consider the plaintiff and the first defendant as members of a joint family, the properties mentioned in schedule C attached to the affidavit accompanying the petition should be partitioned and separate possession should be given to the plaintiff of his share. The learned District Munsiff rejected the application on the ground that as a result of the amendment there will be a total change in the cause of action and jurisdiction from start to finish and that the defendant will be greatly prejudiced by allowing the same. He also pointed out that the petitioner had a more comprehensive and more substantial remedy by way of a regular suit for partition. The main argument of Mr. Sivaramakrishnayya, learned advocate for the petitioner is that the amendment sought does not alter the complexion of the plaint as originally framed and that it does not introduce a new subject-matter. The principle to be applied in such cases has been laid down by the Judicial Committee in *Ma Shwe Mya* v. *Maung Mo Hnaung*[1] in these terms :

"All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but none the less no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject-matter of the suit."

After examining the matter on the facts, their Lordships observed :

"It would be a regrettable thing, if, when in fact the whole of a controversy between two parties was properly open, rigid rules prevent its determination, but in this case their Lordships think that the rules do have that operation and that it was not open to the Court to permit a new case to be made."

Applying this principle, this Court in *Vaithilingam* v. *Natesa*[2] refused an amendment which had the effect of converting a suit in ejectment into a suit for partition. The principle to be applied is thus quite clear. It has been in some cases laid down again that where the amendment has the effect of altering the complexion of the case completely or where a party in whom a valuable right has vested is likely to be deprived of it, an amendment will not be allowed. This case, upon its facts, appears to me to be hit by everyone of those principles, which prohibit an amendment. There were only two items of property in respect of which reliefs were asked for in the original plaint ; in the proposed partition suit into which the suit is sought to be converted, the entire family property as it stood in 1928 or earlier is proposed to be brought in, Schedule C attached to the affidavit consisting of nine items. The original plaint was concerned with only one alienation in favour of the second defendant, while according to the amended plaint, a number of alienations alleged to have been made by the first defendant will have to be investigated. Practically all the evidence that will be material and necessary in the original case of ejectment will perhaps be unnecessary or superfluous or even irrelevant in the partition suit ; while the evidence that will be required in the partition suit will be of a nature radically different from that required with reference to the original plaint. The equities will also be different, as indeed the procedure. Thus from every aspect of the matter, I am convinced that the effect of the amendment would be to alter the nature and complexion of the suit, to alter the cause of action and to change the subject-matter of the suit. Mr. Rangachari for the respondents points out that a certain plea of limitation which has been raised by him and which would be available to him according to the original pleadings would be lost to him altogether in the event of the amendment being allowed. Without conceding that such a plea of limitation is either well-founded or ill-founded, the fact is there, that such a plea of limitation which it would be open to the defendant to raise in one case would be unavailable to him in the other case. Taking all these factors into account, I am not in a position to say that the lower Court was not justified in refusing to accord leave to amend the plaint.

The petition is dismissed with costs.

B.V.V. *Petition dismissed.*

---

1. (1921) L.R. 48 I.A. 214 : I.L.R. 48 Cal. 832 (P.C.).
2. (1912) 23 M.L.J. 189 ; I.L.R. 37 Mad. 529.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Srimath Thirumala Venkata Srinivasacharyulu Ayyavarlam Garu and another .. *Appellants**

v.

Srimath Kidambi Srinivasa Venkatavaradacharyulu (transferee decree-holder) .. *Respondent.*

Execution—Mortgage decree—Purchaser of one of several items—Subsequent acquisition of rights under decree—Application for execution of decree for full amount—Proportionate discharge of decree—Whether can be pleaded as defence—Civil Procedure Code (V of 1908), section 47.

Where a mortgage decree was put in execution by a transferee decree-holder and it appeared that one of the items mortgaged was purchased by the second defendant in execution of a money decree against the mortgagor and he in his turn assigned his rights to the petitioner who subsequently also obtained the assignment of the mortgage decree, and it was contended that the petitioner was entitled to execute the decree only for the decree amount *minus* the proportionate burden of the decree on the item purchased by him,

Held, that the equities if any in favour of the judgment-debtors could be agitated only in an independent suit and that they could not be urged by way of objections in execution.

Held, further, that there could be no apportionment of the decree amount or *pro tanto* discharge of the decree by reason of the purchase made by the petitioner and that the decree was enforceable for the full amount.

Appeal against the order of the Court of the Subordinate Judge, Ellore, dated 27th January, 1944, in E. P. No. 49 of 1942, in O. S. No. 15 of 1939.

P. Somasundaram for Appellants.

P. Satyanarayana Rao for Respondent.

The Judgment of the Court was delivered by

Horwill, J.—The execution petition out of which this appeal arises was in execution of a final mortgage decree of 16th June, 1942, in O. S. No. 15 of 1939. One of the items mortgaged, namely, item 4, was purchased by the second defendant in execution of a money-decree against the mortgagor ; and on the 27th December, 1942, the respondent acquired the rights of the second defendant in this property. On the 19th March, 1943, by Ex. P-1, the respondent obtained an assignment of the mortgage decree in O. S. No. 15 of 1939. He now seeks to execute O. S. No. 15 of 1939 ; and some of the defendants opposed the execution of the decree on the ground that since the respondent had acquired the rights of the mortgagor in a part of the property and had become a transferee decree-holder, he was not entitled to execute the decree at all ; and even if he were, he would be entitled to execute it only for the decree amount *minus* the proportionate burden of the decree resting upon item 4. The learned Subordinate Judge overruled the objection and ordered the decree to be executed for the full decree amount. He held that the equities in favour of the appellants could be considered only in a suit by them for contribution. In appeal, the appellants have not argued the extreme case which they adopted in the lower Court for contending that the decree could not be executed at all. They content themselves here with arguing that the decree can be executed only for the proportionate share of the decree amount.

The question whether the objections of the appellants are tenable or not depends upon whether, in the words of section 47 of the Civil Procedure Code, these matters relate to the "execution, discharge or satisfaction of the decree." If they do, then the Court is bound to consider the questions raised by the appellants, if not, then the Court is precluded from going into those questions ; and the parties must have their equities adjusted in a separate suit. It is argued that the question raised relates to the discharge of the decree ; it is said that upon the respondent's acquiring an interest in item 4 of the property and then obtaining an assignment of the decree, there was a *pro tanto* and automatic discharge of the decree. Even if there had been no decree and we were considering a claim by a mortgagee who had acquired the

* A. A. O. No. 194 of 1944. 6th September, 1945.

interests of a mortgagor, it would be difficult to see how there could have been an automatic discharge of the mortgage amount. A mortgagor could resist a claim by the mortgagee for the full amount only by applying section 60 of the Transfer of Property Act, which enunciates the principle that the mortgagor cannot redeem the mortgage only in part, according to his share, except in cases where the mortgagee has acquired the interests of a mortgagor. The last paragraph of section 60 says:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of the mortgagor."

In *Shah Ram Chand* v. *Pandit Parbhu Dayal*[1], their Lordships of the Privy Council had to decide whether a mortgagee who had released some of the property could sue for the whole of the mortgage amount from the mortgagors owning the other property; and they had occasion in that connection to discuss in detail the effect of section 60 of the Transfer of Property Act and in particular the exception. They said:

"But the exception is made in the latter case, (the case of the mortgagee acquiring the interest of the mortgagor) not on the footing that it is unjust that the full burden of the security should be imposed on the other parts of the property; but because their claim to contribution has now become a claim against the mortgagee or his interest in the equity of redemption. Circuity of action is thought to be avoided if partial redemption be permitted."

It is thus seen that the reason why a mortgagee who acquires the interest of a mortgagor cannot be given a decree for the full amount is that he has himself become owner of a part of the mortgaged property and so his share of the mortgage burden can be set-off even in the mortgage suit against the claim on the mortgage. There is in such a case no fiction of a *pro tanto* discharge of the mortgage amount, except in a very loose sense of that expression.

When we come to consider the case with which we have to deal in this appeal, namely, where a decree has been passed, it is still more difficult to see how by the acquiring of the decree, the decree can be said to have been automatically discharged in part. It seems to us that a decree can only be discharged either by a payment of the whole or part of the decree amount or by agreement between the parties.

There is some authority for the appellants' contention, however, in *Sarju Kumar Mukerji* v. *Thakur Prasad*[2]. The decision in that case was based on a decision of Mahmood, J., in *Kudhai* v. *Sheo Dayal*[3], where the learned Judge said:

"When subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment debtor, or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only *pro tanto*."

The learned Judges then stated that they approve of this rule enunciated by Mahmood, J., and proceeded to repeat it in their own words without any fresh argument. This decision was followed by Madhavan Nair, J., in *Chinniah* v. *A. B. Muthuraman*[4]. The learned Judge held that by fusion of the interests of the mortgagor and the mortgagee, the mortgage decree had become discharged *pro tanto* and the assignee-decree-holder could proceed against the property which he had not purchased after deducting the proportionate burden on his own property of the mortgage debt. The correctness of the above statement in *Sarju Kumar Mukerji* v. *Thakur Prasad*[2], seems to have been assumed; and the learned Judge therefore directed himself only to the special circumstances of the case before him to consider whether there was any reason why the principles laid down in *Sarju Kumar Mukerji* v. *Thakur Prasad*[2] could not be applied to the case under consideration. He held that there was not.

---

1. (1942) 2 M.L.J. 390 : I.L.R. (1942) All. 608 (P.C.).
2. (1920) I.L.R. 42 All. 544.
3. (1888) I.L.R. 10 All. 570.
4. A.I.R. 1934 Mad. 250.

There is another line of cases based on *Amir Chand* v. *Bukshi Sheo Pershad Singh*[1] in which it was held that these questions cannot be raised in execution. The learned Judges recognised that there had been some conflict of authority on this point and said that they would have been disposed to refer the matter to a Full Bench, but thought it unnecessary to do so; because it was clear that no apportionment could take place in execution proceedings. It is true that the learned Judges were influenced to some extent by the difficulties that would arise in considering these matters in execution, where all the persons interested in the apportionment were not parties to the execution—a matter that would seem to us irrelevant, because if the questions raised relate to the discharge and satisfaction of a decree they must be considered in execution, however complicated they might be. However, the learned Judges were definitely of opinion that the balance of authority was in favour of the view that such questions could not be raised in execution proceedings. Although the matter was not discussed fully in *Amir Chand* v. *Bukshi Sheo Pershad Singh*[1], it is the basis of all subsequent decisions of that Court on the same question. The Calcutta view has been set out very clearly in the judgment of Mitter, J., in *Aymamud* v. *Ebaruddin*[2], and we are in complete accord with the learned Judge's reasoning therein. The same view is held in Patna, the leading case being *Sarju Lal* v. *Baijnath Prashad*[3]. A large number of cases were apparently cited before the Court, though they were not specifically referred to in the judgment. The learned Judges said:

> "It is unnecessary to discuss all those authorities; it is sufficient to say that though here and there a discordant note has been struck, still the balance of authority is clearly in favour of the view that the decree-holder has the conduct of the sale and is entitled to execute the decree against any of the mortgaged property as he pleases, and that, if any question of equity arises between the decree-holder and the persons to whom the equity of redemption in the mortgaged properties or in any of them may have subsequently become vested, that equity can only be enforced by an independent suit for contribution and not in proceedings for execution."

The learned Judges do not specifically say that there was not a *pro tanto* discharge, but the judgment proceeds on the basis that the judgment-debtors had nothing but an equity in their favour. If there had been a *pro tanto* discharge, all reference to equities would have been out of place; for the decree would not be legally enforceable for the full amount. The Calcutta and Patna rulings have been followed by Kuppuswami Aiyar, J., in two recent decisions. The first was *Veerappa Chettiar* v. *Chandramouliswara Iyer*[4]. The Allahabad case was not there referred to; but the learned Judge agreed with the decisions of the Calcutta and Patna High Courts in the cases above cited. In C. M. S. A. Nos. 249 and 250 of 1941, he followed his previous decision, quoting an extract from the judgment of King, J., on the same point in C. M. S. A. No. 142 of 1937.

In our view, there was no *pro tanto* discharge of the decree, and that view seems borne out by the weight of authority.

The appeal is dismissed with costs.

B.V.V. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AIYAR.

C. Ramachandra Rao .. *Petitioner**

Madras Public Health Act (III of 1939), section 143 and Criminal Procedure Code (V of 1898), section 197—Prosecution of Health Officer of Municipality for abusing and beating municipal employee subordinate to it—Sanction—Necessity.

Where the Health Officer of a municipality was prosecuted for having abused and beaten the maistri of the scavengers of that municipality, on a contention that the prosecution could not be launched without sanction under section 197, Criminal Procedure Code,

Held, that apart from section 197, Criminal Procedure Code, since the act of beating and abusing was said to have been done by the accused in the municipal buildings to a servant who was a sub-

1. (1906) I.L.R. 34 Cal. 13.
2. A.I.R. 1936 Cal. 537.
3. A.I.R. 1923 Pat. 44.
4. (1943) 2 M.L.J. 45.

* Cr. R. C. No. 441 of 1945. (Cr. R. P. No. 404 of 1945). 26th October, 1945.

ordinate of the municipality, under section 142 of the Madras Public Health Act, the act must be considered to have been done by the accused in the discharge of his duties and consequently, section 142 would apply and sanction would be necessary under that section and a prosecution could not lie without it.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order dated 11th May, 1945, of the Court of the Stationary Sub-Magistrate, Chicacole and passed on the petition filed by the petitioner herein (accused) on 23rd April, 1945, in C. C. No. 394 of 1945, Stationary Sub-Magistrate, Chicacole.

Kasturi Seshagiri Rao for Petitioner.

The Assistant Public Prosecutor for the Crown.

The Court made the following

ORDER.—The only question for determination is whether sanction is necessary before the accused could be prosecuted. The prosecution was at the instance of a maistry of scavengers employed in the municipality of Chicacole, and the petitioner, the accused, was a Health Officer of that Municipality. The scavengers alleging that they had some grievances when the salary was being distributed one evening; instead of receiving the salary they made a hubbub and created some disturbance. The Health Officer was put out and when he noticed the maistry whose duty he thought it was to prevent these people from creating trouble, abused him and took him to task for not having prevented the people from creating disturbance, and is also said to have beaten him. That is the gist of the complaint. For the accused it was stated that a prosecution like this cannot be launched without sanction. It was pleaded in the lower Court that sanction was required under section 197 of the Criminal Procedure Code. It was contended by the prosecution, that as he was not an officer who could be removed only by the Local Government, no sanction was necessary. But then, apart from section 197 of the Criminal Procedure Code under section 142 of the Public Health Act, since the act of beating and abusing was said to have been done by the accused in the municipal buildings to a servant who was a subordinate of the municipality, the act must be considered to have been done in the discharge of his duties and consequently section 142 of the Public Health Act would apply and sanction would be necessary. I therefore find that the prosecution cannot lie without sanction under section 142 of the Public Health Act.

The Revision Petition is accordingly allowed, and the proceedings will be quashed, as admittedly no sanction has been obtained.

V.S. — *Revision allowed and proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE BELL.

Golla Chenchuramayya and another .. *Prisoners** (*Accused* 1 *and* 2).

Criminal trial—Sentence—Principles to be observed in imposing when there are alternative sentences for an offence.

If there are two alternative sentences, a Court should take into consideration all the circumstances of the case and award the sentence which seems to it, in view of those circumstances, the more fitting. The fact that a murder was unpremeditated and that the act was committed in sudden anger are circumstances which will justify the award of the lesser sentence of transportation for life.

Trial referred by the Court of Session of the Nellore Division for confirmation of the sentence of death passed upon the said Prisoners in Case No. 10 of the Calendar for 1945.

K. S. Jayarama Aiyar and *R. Ramalinga Reddi* for Accused 1 and 2.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

---

* R. T. No. 132 of 1945 and Crl. Ap. No. 501 of 1945. 9th October, 1945.

The Judgment of the Court was delivered by

Horwill, J.—The appellants and another were charged before the Sessions Judge of Nellore with the murder of one Guruswami. The learned Sessions Judge found that there was no evidence that the third accused took any part in the transaction in which the murder was committed. He therefore acquitted that accused. He convicted the two appellants of murder and sentenced them to death.

The deceased, the three accused, and the eye-witnesses are all Thottiyans and members of connected families. P. W. 3 is the husband of P. W. 6 and P. Ws. 4 and 5 are their daughters. The deceased was married to P. W. 5 and a brother of the two appellants was married to P. W. 4. P. W. 7 and the deceased were the sons of sisters, while P. W. 8 was a brother of the deceased.

The quarrel that led up to this murder arose out of a dispute with regard to some ragi. P. W. 4 had a sick child and she wanted to purchase a talisman that it might wear to recover its health; and in order to raise the money, she took some of the family ragi. She was rebuked for this by the wife of the third accused, who was the senior female in the family. P. W. 3 came along while the quarrel was taking place and rebuked the women for quarrelling. P. W. 3 later came to blows with the third accused and was knocked down. That led to further recrimination among the women, who then created such a disturbance that the two appellants, who were working in a field about a furlong away, came running to the spot to see what had been done to their women. Even after they arrived, the quarrel continued; and the appellants became more angry as they heard and saw what was taking place. The second accused first expressed his annoyance by striking a stone with his pitch-fork. That had no effect and after some little time he became so annoyed that he took his pitch-fork and struck the deceased on the head with it. The first accused almost immediately raised a heavy stick taken from the side of a cart, and struck the deceased on the head. The deceased fell down immediately and died on the following day. When examined by the doctor, the deceased was found to have an extensive and radiating fracture of the skull, forming a diamond-shaped depressed fracture, the sides of the diamond being about two inches. The piece that had been displaced was broken into eight smaller pieces, which had been driven into the brain substance. There was no possibility of recovery from this grave injury.

Although all the eye-witnesses are persons connected with the deceased, they are also interested in the accused; and there is no reason to suppose that their evidence was not true. A complaint was given as early as practicable; and at all stages their evidence has been consistent. The truth of the material part of their story is confirmed by the circumstance that the accused were long absconding. There are no important contradictions in their evidence; and the learned Judge says that they impressed him while in the box as persons speaking the truth.

The learned advocate for the appellants very rightly does not contend that the evidence of these witnesses is untrustworthy. He has argued that from the medical evidence it would appear that the deceased received only one blow; but that is not the case. P. W. 1, the doctor who conducted the *post-mortem* examination, does say that the injuries could have been caused by one heavy blow; but he does not say that they could not have been caused by two blows, as eye-witnesses say. On the contrary, he says that the injuries might have been caused by two blows. It would also seem probable that there were two blows; because the contused area on the head was most extensive. It spread from the seat of fracture across the frontal bone to the other side of the head.

If the appellants were jointly responsible for the injuries caused, then they were undoubtedly guilty of murder. The learned Sessions Judge does not discuss whether they were actuated by a common intention; but his judgment seems to proceed on that basis. It seems difficult, however, to come to the conclusion that there was a common intention to kill the deceased. The appellants suddenly

left their field to see the cause of the cries and shouts of the persons who were quarrelling. They did not immediately attack anybody. In fact, they might not have known who was responsible for the cries of their womenfolk. The second accused, as has already been said, signified his disapproval by striking his pitchfork on a stone, and it was only after they had been sometime at the scene of offence, that they became angry and struck the deceased. Since the second accused struck first, the first accused may well have intended to cause the death of the deceased, because he saw what the second accused had done; but the second accused, as far as we can see from the evidence, had no reason to suppose that the first accused would follow his example and strike the deceased. Even therefore if they had the same intention, they did not have a common intention, the distinction between a like intention and a common intention being pointed out very forcibly in *Mahabub Shah* v. *Emperor*[1].

If the two appellants were not actuated by a common intention, then each is responsible only for his own acts. The second accused was armed with a pitchfork which has a diameter of about an inch and a half at its thick end. We have no doubt that such a weapon, if used with considerable force, would be sufficient to cause a fracture; but the question which we are unable to decide is whether, in fact, it did so. One often comes across cases where a lethal weapon is used under circumstances which indicate that the person using it intended to cause death or grievous hurt; but either because the assailant was not suitably placed for delivering a heavy blow or because of the movements of the person at whom he was aiming, only trivial injuries have been inflicted. It may therefore well be that although the accused may have intended to cause grievous injury with his weapon, he may not in fact have done so. This doubt is strengthened by the medical evidence that the whole injury might have been caused by one blow. It is therefore possible, though perhaps not probable, that the serious injury to the head was caused almost entirely by the second blow and that the first blow might not by itself have had fatal consequences. If that is so, the second accused, who struck the first blow with the lighter instrument, can be found guilty only of causing simple hurt with a dangerous weapon, an offence punishable under section 324 of the Indian Penal Code.

The case against the first accused seems to us to stand on a very different footing. He saw that the second accused had struck the deceased on the head with his stick, and yet he immediately raised a heavy weapon and struck a blow which felled the deceased to the ground. If the second accused did not cause a fracture of the skull or caused a fracture less serious than that found on post-mortem examination, then the act of the first accused would clearly amount to murder; because he was either almost entirely responsible for the death of the deceased or materially contributed to it. Even if the fracture was caused entirely by the second accused, the first accused would still be guilty of murder; because his blow, delivered immediately after the blow of the second accused, must necessarily have accelerated the death of the deceased. It therefore seems to us that the first accused must have been guilty of the offence with which he was charged.

The learned advocate for the appellants relies on certain observations of the learned Sessions Judge to indicate that it is unlikely that the appellants had the intention necessary for a conviction under section 302 of the Indian Penal Code. The learned Sessions Judge said:

"The seriousness of the blows was not known either to the accused or to the other party at that stage, because the evidence shows that when the accused were leaving the place the third accused gave a parting kick to the fallen Guruswami, stating that he was shamming. The relatives of Guruswami had run home and fetched dry ginger powder and cotton in order to render first aid and bring Guruswami back to consciousness. The accused went and stood near their house for a time and as a crowd started to gather they went inside their house."

At the best this would only indicate that the third accused, who has been acquitted, and the relatives of Guruswami still believed that there was a chance of Guruswami's

1. (1945) 2 M.L.J. 144: L.R. 72 I.A. 148 (P.C.).

recovering; but we must assume that the two appellants, who delivered the blows, intended the probable consequences of their acts. They alone knew the force with which their blows were delivered. The conviction of the first accused under section 302 of the Indian Penal Code is therefore confirmed and the conviction of the second accused changed from one under section 302 to one under section 324 of the Indian Penal Code.

There remains the question of the sentence to be imposed on the first accused. The learned Sessions Judge said on this point:

"So far as the punishment is concerned, there are no extenuating circumstances in law to merit the lesser of the two sentences prescribed. The accused on account of momentary passion have killed a middle-aged ryot who was the bread-winner of his family. The fact that they are middle-aged ryots or that they were living amicably before with the deceased to wit and that the offence itself arose from an unexpected altercation that evening, and that the offence has not been accompanied by aggravating features are all matters, which cannot be considered by Court as extenuating circumstances for awarding the lessor of the two sentences. They are fit matters to be considered when the prerogative of mercy comes to be exercised and which is in other hands."

We cannot agree with this exposition of the law. If a Court has two alternative sentences, it should take into consideration all the circumstances of the case and award the sentence which seems to it, in view of those circumstances, the more fitting. The learned Judge has himself in the passage set out above given reasons why it would be more appropriate to sentence the appellants to transportation for life, and there is very little to add to what the learned Sessions Judge has said. The evidence shows that the murder was unpremeditated and that the act was committed in sudden anger. The sentence of death is therefore changed to one of transportation for life. The second appellant is sentenced to three years' rigorous imprisonment.

K.S. — *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Kuppammal ... *Appellant**

v.

Rukmani Ammal and another ... *Respondents.*

Fatal Accidents Act (XIII of 1855)—Compensation received under private settlement by Hindu widow and children as dependants for death caused by fatal accident—Apportionment—Principles.

Where an amount is paid to a Hindu widow under a private settlement as compensation to herself and her children for the death of her husband caused by a fatal accident, the amount must be apportioned between the widow and her children on the same principles which would have applied if the amount had been recovered by a suit or action in which case the Court fixing the amount of compensation apportions the amount among the dependants in proportion to the loss caused to each by the death of the deceased. There is no hard and fast rule as to the proportion in which the amount has to be divided where there are a large number of persons suffering injury by the death of a relation on whom they were all dependent. Roughly the son and widow may be given equal shares, and a daughter a half of what a son takes.

Appeal against the decree of the Court of the Subordinate Judge, Salem in A. S. No. 59 of 1943, preferred against the decree of the Court of the District Munsiff of Salem in O. S. No. 723 of 1940.

D. Ramaswami Iyengar for Appellant.

T. L. Venkatarama Aiyar and *C. P. Rajagopala Iyengar* for Respondents.

The Court delivered the following

JUDGMENT.—One Chinnaswami Rowth met his death in the Bommidi Railway disaster of 1920. He left Thayarammal his wife, a daughter the plaintiff and Sriramulu a baby, one or two months old. The railway company gave a sum of Rs. 2,500 as compensation and with that sum Thyarammal managed to maintain hereself and her children. She got the plaintiff married and made several purchases. She acquired two lands and a house described in the plaint A schedule. She reconstructed the house. She also laid out moneys in the shape of loans to third parties

* S. A. No. 2008 of 1944. 19th September, 1945.

and the outstandings left by her are described in Schedule B attached to the plaint. She is also alleged to have left some jewels which are described in schedule C. The plaintiff claimed that the properties described in the various schedules attached to the plaint were all the stridhanam properties of her mother Thayarammal and that they were her absolute properties. The claim therefore was that the plaintiff was the stridhanam heiress of her mother and that she was entitled to all the properties. Thyarammal the mother died in April, 1937. Sriramulu survived her and died in 1940 leaving a widow, the first defendant in the suit. The second defendant is impleaded as being in possession of some of the jewels belonging to the mother. The first defendant's case was that the properties all belonged to Chinnaswami Rowth and were not the absolute properties of Thyarammal. The positive case put forward was that the properties were purchased out of the funds left by the plaintiff's father, Chinnaswami Rowth. The trial Court found that there was no proof that the properties were purchased with the funds left by Chinnaswami Rowth. The plaintiff did not state in the plaint wherefrom her mother got the funds with which she acquired the properties in question. At the trial it was mentioned that her mother, Ammani Ammal, gave a large sum of money to Thyarammal and that that was the source of Thyarammal's later acquisitions. Both this case of the plaintiff and the case of the defendants that the source of the purchase money was traceable to the assets of Chinnaswami Rowth were found against. It transpired that really the sum of Rs. 2,500 which was paid by the railway company formed the nucleus of these acquisitions. Thyarammal seems to have been a very prudent woman. She managed the sum that was given by the railway company very carefully, lent out the moneys, purchased properties, got the daughter married, reconstructed a house, and left some properties, immoveable and moveable. These are the findings of both the lower Courts. On these findings, the question is whether Thyarammal and the plaintiff got any right in the properties. Under the Fatal Accidents Act (XIII of 1855),

> "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action or suit for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony or other crime.
>
> Every such action or suit shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death shall have been so caused . . . . and in every such action the Court may give such damages as it may think proportioned to the loss resulting from such death to the parties respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered after deducting all costs and expenses . . . . shall be divided amongst the before-mentioned parties, or any of them, in such shares as the Court by its judgment or decree shall direct."

Thus the death of the person injured is no defence and it does not absolve the party at fault from paying damages to the relatives of the deceased. The persons who are entitled to recover damages, notwithstanding the death of the injured party, must be the wife, husband, parent or child. The action should be brought for the benefit of all or any of these persons and the Court is to apportion the amount among these persons in proportion to the loss caused to each of them by the death of the deceased. Under the corresponding English Act we find a similar provision, only, instead of the Court, it is the Jury that has to determine the amount and to fix the proportions in which the parties entitled to the amount should divide the same. In cases where the amount is paid not through Court but by private settlement, the question is more difficult, but we have to be guided by the same principles which would have applied if the amount had been recovered by a suit or action. There are some decisions which have dealt with this question. In *Bulmer* v. *Bulmer*,[1] a sum of money was received from a railway company by way of compensation without any action having been brought under *Lord Campbell's Act*, 9 and 10 Vict. C. 93. The executors who realised the amount brought an action in the Chancery Division, to which all the relatives of the deceased were made parties,

1. (1883) 25 Ch. D. 409.

asking for a declaration as to the persons entitled to the money. It was held that the Court could distribute the fund among the relatives of the deceased in the same manner as a Jury could have done in an action under the Act (which is against the person bound to pay the damages) and proceeded to divide the amount among the relatives. At page 412 Chitty, J. observes this:

"The apportionment, however, must be made on the same principle as it would have been if the matter had been before a jury, and they would require to be satisfied that injury had in fact resulted to the persons claiming damages. In this case the principle of distribution must not be one of equal division, but in proportion to the damage sustained by reason of the death."

There, there were six children and a widow. We may leave out of account some other relations to whom some lump sums were given. The learned Judge divided the properties giving two shares to the widow and one share each to the six children, the widow being considered to be the person who suffered the greatest injury.

There are very few Indian cases dealing with the question. In *Secretary of State* v. *Mt. Ratan Kali*,[1] the surviving members to whom the damages were awarded were the widow, a major son, a minor son and a daughter. The Court awarded Rs. 3,840 and divided the amount thus: wife Rs. 1,800, major son Rs. 600, younger son Rs. 740, daughter Rs. 700. Roughly the widow was given a half of the property and the children together were given half. In *Vinayak Raghunath* v. *The Great Indian Peninsula Railway Co.*,[2] there were only a widow and a daughter and the sum of Rs. 10,000 was divided, giving Rs. 7,000 to the widow and the Rs. 3,000 to the daughter. In another case dealt with in the same judgment, out of a sum of Rs. 6,500, the widow was given Rs. 2,500 and the rest divided among two major sons, a minor son and a minor grandson. In *Stanes Motors, Ltd.* v. *Peter*,[3] a similar case, a sum of Rs. 6,000 was divided equally between the widow and the son. There is no hard and fast rule in what proportion the amount is to be divided, where there are a number of persons suffering injury by the death of a relation on whom they were all dependent. Bearing these principles in mind and the principle embodied in the Hindu Women's Property Act the widow and the son may be given equal shares. As between the son and the daughter grant of one-fourth to the daughter may not be justified, but the rule that is being embodied in the proposed legislation on the Hindu law giving the daughter a half of what the son takes seems to be a very reasonable standard to adopt. That is the principle of the Mohamedan law of Intestate Succession which is supposed to be the most equitable system of distribution among the relations. In this view the plaintiff (daughter) would have been entitled to one-fifth; the son and the mother would be entitled to a two-fifth each. It is in evidence that this daughter was subsequently married at a cost of Rs. 500 and that some jewels were also made for her marriage. Her claim to one-fifth of Rs. 2,500 may therefore be taken to have been satisfied by the amounts spent on her marriage. Then there remain the mother and the son.

The plaintiff claimed that all the properties are her mother's stridhanam properties. While denying that the properties were the mother's stridhanam properties, no alternative case was set up on behalf of the defendants that the mother gave up what was her stridhanam propery in favour of her son. All that can be said in this case is that, as the daughter's claim was settled by some moneys being spent probably from the subsequent income realised from the investment of the original sum of Rs. 2,500, the mother and son treated themselves as equal owners of whatever remained in the family. There are no materials from which one can hold that the mother gave up during her lifetime all her interest in favour of her son. As stated above, there is no such plea in the written statement, and the evidence that has been referred to by Mr. T. L. Venkatarama Aiyar, the learned Counsel for respondent, is not enough to show that there was any such relinquishment by the mother in favour of her son. All the purchases were made in the mother's name. EX. P-17 of 1930 and Ex. P-18 and P-19 of 1933 stood in her

1. A.I.R. 1932 Lah. 355.
2. (1870) 7 Bom. H.C.R. 113.
3. (1935) 70 M.L.J. 155: 59 Mad. 402.

name. The patta stands in her name. Ex. D-6, the cist Receipt Book, shows that throughout her lifetime the cist was paid in her name. We have the bills issued for the purchase of timber for the erection of the suit house, and Ex. P-24 is a bill issued in her name. Exs. P-24 (*a*) to P-24 (*h*), though not issued in her name, were obviously bills issued to her. It is true that in the invitation issued for the *grahapravesam* ceremony of the suit house the son's name was mentioned, but a widow with a son would not, even in cases where she builds a house for herself, issue the invitation in her own name but would issue it in the name of her son. That is not a ground for saying that even the house was treated as her son's property. It is true that subsequent to the death of Thayarammall the plaintiff did not immediately claim that she is entitled to her mother's properties. Reference is made by Mr. Venkatarama Aiyar to a panchayat at which the plaintiff seems to have claimed a payment of a debt due to herself in respect of a promissory note executed by the mother in her favour of a hand loan taken by the mother from her and in respect of some other sums spent by the daughter for the mother's illness. No doubt there was a panchayat and the sums claimed were found to be true, and the money paid. Ex. D-28 is the memorandum drawn up at that time and that is signed by both the plaintiff and Sriramulu, but there is nothing to show that the properties were expressly or even impliedly admitted by the plaintiff to belong exclusively to Sriramulu. The only comment that can be made is that she herself was the heiress to her mother's property, that if all the property was her mother's property, there was no meaning in claiming the same against properties which devolved on herself. In the view that I have taken that the mother was entitled only to a half, there is no such incongruity in the daughter having claimed the repayment of the sum due to her.

In the result I declare that the plaintiff is entitled as the stridhanam heiress of her mother to half of the properties and that the first defendant is entitled to the other half as the widow and heiress of her husband, Sriramulu. The existence of the outstandings as mentioned in B schedule is not denied. Of the two jewels mentioned in schedule C, item (1) is found to be in existence and in the possession of the second defendant. The second defendant will be liable for the jewel mentioned as item (1) of C schedule or its value as mentioned in that schedule. The second item is not proved to exist. There will be a preliminary decree directing a division in two equal shares of the immoveable property mentioned in schedule A, of the outstandings in schedule B and of item (1) of schedule C. The plaintiff is also entitled to mesne profits on her share. The necessary enquiries as to the income will be made and the result of that enquiry and of the division will be embodied in the final decree. Each party will bear his or her own costs throughout. (No leave).

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

Sayyed Khasim Sahib and another .. *Petitioners**

v.

The Official Receiver, Guntur and another .. *Respondents.*

Provincial Insolvency Act (*V of* 1920), *section* 68—*Person aggrieved—Creditor applying to set aside sale of insolvent's property—No proof of his debt prior to date of his application—Inclusion of his name as supplemental creditor prior to the date of the order thereon—Maintainability of the application—Inherent power of Court to rectify receiver's mistakes or modify his orders.*

A creditor who had not proved his debt applied under section 68 of the Provincial Insolvency Act to set aside a sale of the insolvent's property. On a contention that such a creditor had no *locus standi* to maintain the application, not being a person aggrieved within the meaning of section 68,

Held, that apart from the fact that the creditor was added as a supplemental creditor in the schedule prior to the date of the order on his application under section 68, as the receiver was an officer of the Court, the Court had an inherent power to rectify the errors or mistakes of the receiver

---

* C. R. P. Nos. 1304 and 1305 of 1944. 11th October, 1945.

and reverse or modify his acts or decisions and that as it was competent even to a stranger to bring to the notice of the Court anything done by the receiver in excess of his authority, in the circumstances, the Court had power to set aside the sale on the application of such a creditor.

Petitions under section 75 clause (1) of the Provincial Insolvency Act, praying that the High Court will be pleased to revise the orders of the District Court of Guntur, dated 8th July, 1944, in C.M.A. Nos. 104 and 103 of 1943 respectively (I.A. No. 992 and 991 of 1942 in I.P. No. 6 of 1938, Subordinate Judge's Court, Guntur).

V. Govindarajachari and *D. Narasaraju* for Petitioners.

Ch. Raghava Rao and *G. C. V. Subba Rao* for Respondents.

The Court delivered the following

JUDGMENT.—Both these petitions involve the same point. An insolvent's property was sold and two persons who are the petitioners in these matters purchased the respective items. One of the creditors filed an application under section 68 of the Provincial Insolvency Act to set aside the sales. The first Court upheld the sales, but on appeal by the creditor the District judge set aside the sales and directed fresh sales to be held.

Two objections were taken by the purchasers. The first objection was that the creditor, being a person who had not proved his debt either by the date of the sales or by the date of his application, had no *locus standi* to maintain the application, not being an aggrieved person within the meaning of section 68. The second objection was one based on the merits—that the price fetched was not low and that there was no irregularity in the conduct of the sales.

With reference to the first objection, the learned District Judge held, differing from the learned Subordinate Judge, who first heard the petition, that the Court was competent to entertain the matter. The learned District Judge pointed out that the creditor had applied on 9th June, 1942, for being added as a supplemental creditor in the schedule of proved creditors and that final orders on that application were passed on 27th August, 1943, so that on the date when the first Court passed its order on the petition the creditor had been added as a supplemental creditor in the schedule. Apart from that circumstance, the learned District Judge relying upon *Data Ram* v. *Deokinandan*,[1] held that it is not merely the insolvent or the creditors or any other aggrieved person who can take action to bring the conduct of a receiver in any particular respect to the notice of the Court; but the receiver being an officer of the Court, when it comes to the knowledge of the Court that his action in any particular respect is objectionable, the Court has inherent powers to rectify his errors or mistakes or to reverse or modify his acts or decisions. This decision does not stand alone. The same view was expressed by a Division Bench of the Calcutta High Court in *Hanseswar Ghosh* v. *Rakhal Das Ghose*,[2] where relying upon three English cases the learned Judges held that when a receiver has been appointed, he becomes an officer of the Court, and if he is about to act in excess of his authority, it is competent even to a stranger to bring that fact to the notice of the Court, which has inherent power to review the conduct of the receiver, so that the stranger may not be prejudiced by an unlawful act of its own officer. In these circumstances the first objection must fail.

As regards the second objection, the learned District Judge has mentioned a number of circumstances which definitely suggest that the sales were conducted without giving due publicity and in a manner which, to say the least, is suspicious. The price fetched was undoubtedly low. That is the view taken by both the Courts below. In these circumstances the learned District Judge was perfectly right in setting aside the sales and directing fresh sales to be held.

Both the revision petitions are dismissed with costs—different sets.

V.S. *Petitions dismissed.*

---

1. (1919) I.L.R. 1 Lah. 307: 58 I.C. 6.
2. (1913) 20 I.C. 683.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE YAHYA ALI.

M. Perumal Chettiar .. *Appellant**

v.

Avula Kotayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 6, 7 and 8—Order transferring decree passed—Execution petition to transferee Court without producing copy of the order—Dismissal without registering—Propriety—Proper procedure.

The transfer of a decree to another Court for execution comes into effect from the date when the order of transfer was made and when once the order of transfer is made the Court to which the decree is transferred has jurisdiction to entertain the application for execution, even though a copy of the decree has not been received by it.

Ademma v. *Venkata Subbayya,* (1933) 65 M.L.J. 137 : I.L.R. 56 Mad. 692 and *Venkatratnam* v. *Chennayya,* (1939) 50 L.W. 764, relied on.

Where in fact an order transferring the decree has been made and an application for execution is made on the same day to the transferee Court, even though the necessary papers were not received by that Court the petition should be received and proceeded with and not dismissed without registering on the ground that no order of transmission was produced. It is open to the Court thereafter to give time to the party for furnishing the necessary papers and if those papers are not produced to deal with the execution petition accordingly.

Appeal against the order of the Court of the Subordinate Judge, Guntur, dated 20th April, 1944, and made in App. No. 421 of 1943 preferred against the order of the Court of the District Munsiff, Narasaraopet, dated 9th February, 1942 in E.P. *Nil.* of 1942 in S.C.S. No. 13990 of 1929, Small Cause Court, Madras.

N. Rajagopalan for Appellant.

M. Subramanya Sarma for Respondents.

The Court delivered the following

JUDGMENT.—The order of the learned Subordinate Judge against which this appeal has been filed proceeds upon the view that the District Munsiff, Narasaraopet, had no jurisdiction at all to entertain the execution petition that was filed in his Court on 6th January, 1942 either on the date of the filing of the execution petition or on 9th February, 1942 when the same was rejected. In the course of the Judgment the learned Subordinate Judge while referring to the application made in the Small Cause Court on 10th December, 1941 for transmission of the decree states that that alone would not confer jurisdiction on the District Munsiff's Court Narasaraopet to execute the decree. He further states that the appellant had no right at all to present the application to the District Munsiff, Narasaraopet, before the order of the transmission of the decree (meaning presumably before the receipt of the order directing transmission) and that the lower Court rightly returned the application on 10th January, 1942 on the ground that the decree copy had not been received from the Small Cause Court, Madras. This view is opposed to the decision of a Division Bench of this Court in *Ademma* v. *Venkata Subbayya.*[1] There it was held that the transfer of a decree to another Court for execution comes into effect from the date when the order of transfer was made and when once the order of transfer is made the Court to which the decree is transferred has jurisdiction to entertain the application for execution, even though a copy of the decree has not been received by it. This decision has been followed in *Venkatratnam* v. *Chennayya*[2].

What happened in the present case was that when the application for execution was filed in the Madras Small Cause Court on 6th January, 1942, that Court made the following order : " Transmit.. Prepare extract and hand over to party to-day." (It is not ' hand over to post to-day ' as would appear from the certified copy of that order furnished by that Court to the appellant). The decree extract and certificate appear to have been handed over to the advocate for the plaintiff on

* A. A. A. O. No. 358 of 1944. 12th October, 1945.

1. (1933) 65 M.L.J. 137 : I.L.R. 56 Mad. 692. 2. (1939) 50 L.W. 764 at 765.

the same day. It is not known how it happened that neither the decree extract nor the certificate was produced or filed before the transferee Court. On the same date, namely 6th January, 1942, an application was made to the District Munsiff of Narasaraopet for the execution of the decree. That application was rejected on 9th February, 1942, because the order of transmission and the decree extract and certificate were not filed although time was given for that purpose. The circumstances in which those papers could not be produced would be a matter which might call for investigation; but having regard to the principle laid down in the two decisions referred to above, namely, that an order of transmission takes effect from its date and that an execution petition can be filed in the transferee Court after that date even though the necessary papers were not received in that Court, it is clear that the view upon which the learned Subordinate Judge has acted is erroneous. It is not a case where no order had in fact been passed transferring the decree to the other Court. The order of transmission was, as stated already passed on 6th January, 1942, and this application was made on the same date presumably after the passing of the order. Therefore, the execution petition itself which was filed in the District Munsiff's Court, Narasaraopet, should have been registered and proceeded with. It should not have been rejected without even registering it. It was open to the Court thereafter to give time to the party for furnishing the necessary papers and it was open if those papers were not produced as per directions to deal with the execution petition accordingly. But on the ground that no order for transmission was produced in Court the petition cannot be rejected without being registered, when as a matter of fact we find that such an order was actually passed and does exist. The order of the learned Subordinate Judge is therefore set aside, the execution petition shall be restored to the file of the District Munsiff, of Narasaraopet, and registered and disposed of according to law.

In the result the appeal is allowed but in the circumstances of the case each party will bear his own costs.

Leave to appeal is refused.

K.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAMANNAR.

Aravapalli Subbi Setti and another .. *Appellants**

v.

Burle Lakshminarasamma and others .. *Respondents.*

Mortgage—Suit on—Limitation—Acknowledgment by mortgagor subsequent to transfer of his interest in one of the mortgaged properties—Transferee not bound by acknowledgment—No saving of limitation.

An acknowledgment by a mortgagor in respect of the mortgage made subsequent to his transfer of one of the properties comprised in the mortgage will not bind the transferee and cannot be relied upon in a suit on the mortgage against the transferee which is otherwise *prima facie* barred by time.

Bank of Upper India, Ltd. (in liquidation) v. *Robert Hercules Skinner*, (1942) 2 M.L.J. 559 : I.L.R. (1942) Lah. 686 (P.C.).

Appeals against the decrees of the District Court, Guntur in A.S. No. 344 of 1942 preferred against the decree of the Court of the Subordinate Judge, Guntur, in O.S. No. 55 of 1939.

V. Suryanarayana, *V. Govindarajachari* and *V. V. Raghavan* for Appellants.

K. Kameswara Rao for Respondents.

The Court delivered the following

JUDGMENT.—The same question arises in both these second appeals, a question of limitation. Though I listened to an interesting and exhaustive argument from Mr. V. Suryanarayana for the appellants, the cases appear to be directly governed by the recent decision of the Judicial Committee in *Bank of Upper India, Ltd.* (*in liquidation*) v. *Robert Hercules Skinner*, [1]. The facts necessary for the disposal of these

---

* S.A. Nos. 1466 and 1467 of 1944. 25th October, 1945.

1. (1942) 2 M.L.J. 559 : I.L.R. (1942) Lah. 686 (P.C.).

appeals are as follows: The plaintiffs in the two suits sued for the recovery of the balance of money due to each of them under two mortgages dated 7th August, 1924, by sale of one item out of the properties secured by the deeds (Exs. P-1 and P-2) respectively. The contesting defendant claims title to this item under a deed of sale dated 28th April, 1926, from the mortgagor. The suits were brought in 1939 and would *prima facie* be barred by limitation. The plaintiffs, however, rely upon an acknowledgment made by the mortgagor in respect of their two mortgages in a deed of trust dated 26th September, 1927 (Ex. P-4). If the acknowledgment is valid and binding against the contesting defendant, first respondent, then the suit would be in time. It may be noticed that the acknowledgment was made by the mortgagor after he had conveyed his interest in the item now in suit to the first respondent in 1926.

The question for determination is whether an acknowledgment made by a mortgagor after transfer of his interest in a particular property forming part of the hypotheca will bind the transferee. The identical question was answered in the negative by the recent decision referred to in *Bank of Upper India, Ltd. (in Liquidation)* v. *Robert Hercules Skinner.*[1] It was there held that an acknowledgment made by the mortgagors after they had parted with their interest to the purchasers does not bind the purchasers.

During the course of his argument Mr. Suryanarayana tried to rely on certain features, which, according to him, distinguish this case from other cases, *viz.*, that in this case the personal remedy against the mortgagor was alive on the date of acknowledgment and that the mortgagor had not parted with all the property hypothecated at the time when he made the acknowledgment. Unfortunately for him, however, it appears from the report in *Bank of Upper India (in Liquidation)* v. *Robert Hercules Skinner*[1], that in the appeals which went up to the Judicial Committee from Allahabad, the mortgagor's interest in some only of the properties had been transferred and the judgment of the Judicial Committee proceeds on the assumption that the personal remedy had not become barred (*vide* page 689). The suits were therefore barred by limitation and the decision of the lower Court is correct. The appeals are dismissed with costs of the first respondent.

The first respondent has preferred memoranda of cross-objections in respect of a moiety of the costs disallowed to her in both the Courts. It is well known that costs are in the absolute discretion of the Court and though no reason has actually been assigned by the lower appellate Court in disallowing her, though the successful party, her full costs, I do not think I should interfere in second appeal with the discretion exercised by the learned District Judge. The memoranda of cross-objections are dismissed but without costs.

Leave refused. — *Appeal & Memoranda of objections dismissed.*

V. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE RAJAMANNAR.

Pathi Gundeppa .. *Appellant**

v.

The Official Receiver, Bellary .. *Respondent.*

Insolvency—Alienation of moveables—Avoidance by Official Receiver—Subsequent application for mesne profits—Period for which profits may be allowed—Provincial Insolvency Act (V *of* 1920).

The principle of the decision in *Muthuswami* v. *Official Assignee, Madras,* I.L.R. (1936) 59 Mad. 1020 (F.B.) is also applicable to applications under the Provincial Insolvency Act. Where the Official Receiver first applied for an order to set aside certain alienations of moveables by the insolvent and after it was ordered he applied for an order directing the alienee to pay mesne profits in respect of the items sold,

Held, that the Official Receiver was only entitled to mesne profits for a period of three years before the date of his application.

1. (1942) 2 M.L.J. 559 : I.L.R. (1942) Lah. 686 at 687 (P.C.).

* As. A. O. Nos. 622 and 623 of 1944. 19th October, 1945.

Appeals against the order of the District Court, Bellary, dated 17th April, 1944, in I. A. Nos. 177 and 178 of 1943 in I. P. No. 28 of 1930.

Kasturi Seshagiri Rao for Appellant.

B. Sitarama Rao and *T. Krishna Rao* for Respondent.

The Judgment of the Court was delivered by

The Chief Justice.—On the 10th November, 1930, two partners in a cloth business, named Gaveppa and Rudrappa respectively, were adjudicated insolvents in the Court of the District Judge of Bellary. They had also carried on a motor bus business. On the 3rd April, 1930, Gaveppa sold four motor buses to the appellant for Rs. 10,000 and on the 29th April, 1930, he sold two others for Rs. 2,500. On the 28th April, 1930, he sold a motor shed to the appellant for Rs. 170. On the 5th April, 1935, the Official Receiver filed an application (I. A. No. 77 of 1935) for an order setting aside the sales of the motor buses on the ground that the transaction constituted fraudulent preferences. On the 11th February, 1935, he filed an application (I. A. No. 86 of 1935) for an order setting aside the sale of the shed on the same ground. The District Judge dismissed the applications, but on appeal to this Court they were allowed and the transactions set aside by a judgment dated the 18th March, 1942.

On the 17th August, 1943, the Official Receiver filed I. A. No. 77 of 1943, in which he asked for an order directing the appellant to pay mesne profits in respect of the shed at the rate of Rs. 12 per mensem from the date of the alienation. On the same date he filed another application (I. A. No. 178 of 1943) asking the Court to pass an order directing the appellant to pay into Court Rs. 2,500, the price of the two buses sold on the 29th April, 1930 (he had already paid Rs. 10,000, the price of the four buses first sold) and interest at 12 per cent. on Rs. 10,000 from the 3rd April, 1930, and at the same rate on Rs. 2,500 from the 29th April, 1930. The appellant opposed these applications on the ground that they did not lie, that they were barred by the doctrine of *res judicata* and that they were out of time. The plea of *res judicata* was based on the fact that in his application asking for declarations that the alienations were void on the ground that they constituted fraudulent preferences the Official Receiver had also asked for mesne profits and interest but no order was passed on these prayers either by the District Court or by this Court on appeal.

The District Judge held that the applications did lie and that the doctrine of *res judicata* did not operate. He did not, however, deal with the question of limitation. Holding that the applications lay he granted mesne profits in respect of the motor shed at the rate of Rs. 12 per month from the 11th February, 1935, the date on which the Official Receiver applied for an order under section 54 of the Provincial Insolvency Act in respect of that alienation and interest on Rs. 10,000 and Rs. 2,500 at six per cent. from the 5th February, 1935, the date on which the Official Receiver applied for an order in respect of the alienation of the buses.

In this Court the learned advocate for the appellant has conceded that the Court has power to order payment of mesne profits and of interest, but he says that the District Judge erred in giving mesne profits and interest from the dates of his application under section 54. He contends that the law of limitation applies and that in respect of mesne profits he can only recover the amount of Rs. 12 per mensem for three years prior to the 17th August, 1943, and interest on Rs. 10,000 and Rs. 2,500 for six years prior to that date. In respect of the mesne profits he says that article 109 of the Limitation Act applies and in respect of interest, article 120. He further contends that the District Judge erred in rejecting the plea of *res judicata*.

We will deal first with the question of *res judicata*. The District Judge rejected the plea on the ground that his predecessor and the High Court had not considered the question and therefore it must be assumed that it was the intention of the parties to have the question of mesne profits and interest decided at a later stage. As the

District Judge who heard the applications under section 54 dismissed them, the question of mesne profits and interest did not arise. In this Court the only question was whether the transactions amounted to fraudulent preferences and very properly the Court did not enter into a discussion of the amount which the Official Receiver was entitled to recover from the appellant. It was obviously the intention that any further questions should be first decided by the Insolvency Court. We agree with the District Judge in holding that there is no substance in the plea of *res judicata*.

The appellant is on much better ground with regard to his plea of limitation. In *Muthusami* v. *Official Assignee, Madras*[1], a Full Bench of this Court held that an application under section 7 of the Presidency Towns Insolvency Act is equivalent to a suit for the purposes of section 3 of the Indian Limitation Act which applies the articles of the Act to all suits. That was a case under the Presidency Towns Insolvency Act. A mortgagor was adjudicated insolvent in the month of February, 1925. In the month of March, 1931, the Official Assignee applied under section 55 of the Presidency Towns Insolvency Act for an order setting aside the mortgage. His application was granted in February, 1932, and in December, 1934, he applied for an order calling on the mortgagee to account for the rents and profits which he had received from the mortgaged property. The Court held that the mortgagee was liable for mesne profits only for the period of three years immediately preceding the Official Assignee's application. That decision was under the Presidency Towns Insolvency Act but obviously the same principles must apply to similar applications under the Provincial Insolvency Act. Consequently we hold that the Official Receiver is only entitled to mesne profits in respect of the shed at Rs. 12 per mensem for three years immediately preceding the 17th August, 1943, and to mesne profits at the same rate from that date until the 19th November, 1943, when the appellant delivered possession of the shed to him. With regard to interest, the Official Receiver will have interest at six per cent. on Rs. 10,000 from the 17th August, 1937 to 19th August, 1942, when he deposited Rs. 10,000 in Court. On the Rs. 2,500, the Official Receiver will have interest at the same rate from the 17th August, 1937, until payment. The District Judge's order will be varied accordingly.

The appellant has succeeded in part. He will get half his costs in each appeal.

The Official Receiver has filed memoranda of cross-objections claiming that he is entitled to mesne profits and interest from the dates of the alienations. As these claims are unsustainable, the memoranda of cross-objections are dismissed with costs.

Appeal allowed in part & Memoranda of objections dismissed.

B.V.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE KOMAN.

A. K. Subramania Chettiar .. *Appellant**

v.

The Collector of Coimbatore .. *Respondent.*

Land Acquisition Act (I of 1894), section 18—Reference by Collector—Question of limitation also mentioned—Power of Court to decide—Collector making reference as judicial officer.

The Court has power when a reference is made under section 18 of the Land Acquisition Act, to go into the question of limitation. This is specially so in a case where the Collector himself has included the question of limitation as part of the reference in his letter accompanying the reference and has not decided the question himself.

When the Land Acquisition Officer purports to act under Part III of the Act, he acts as a judicial officer and not merely as an agent or mouthpiece of the Government.

---

1. (1936) 71 M.L.J. 289 : I.L.R. 59 Mad. 1020 (F.B.).

* Appeal No. 328 of 1944. 21st September, 1945.

Ezra v. *Secretary of State for India,* (1905) L.R. 32 I.A. 93 : I.L.R. 32 Cal. 605 (P.C.) ; *Abdul Satar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition,* (1926) 46 M.L.J. 209 : I.L.R. 47 Mad. 357 (F.B.) ; *Sri Venkateswaraswami Varu* v. *Sub-Collector, Bezwada,* (1943) 1 M.L.J. 66 and *Mahadeo Krishna* v. *Mamlatdar of Alibag,* I.L.R. (1944) Bom. 90, considered.

Appeal against the order of the Court of the Subordinate Judge, Coimbatore, dated 29th January, 1944, in C. C. No. 112 of 1941 in O. P. No. 184 of 1941.

T. K. Subramania Pillai and *M. Annamalai* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

Koman, J.—The appellant was the owner of a premises in Ward No. 7 of the Coimbatore Municipality. The premises consisted of a house in the occupation of tenants. This property was acquired by Government under the Land Acquisition Act (Act No. I of 1894). At the appellant's request, a reference was made under section 18 of the Act by the Collector to the Court of the Subordinate Judge of Coimbatore. The learned Subordinate Judge held that the application for a reference made by the appellant under section 18 of the Act was not made within the time prescribed in the proviso to that section and that therefore the reference was barred by limitation. The learned Judge also held that on the basis of the materials placed before him the appellant had been awarded by the Land Acquisition Officer a fair and equitable price.

It is argued on behalf of the appellant that the finding by the learned Subordinate Judge on the question of limitation is not correct and that the Sub-Judge had no power to go into the question of limitation. In this case, the award was passed on 12th March, 1941, and notice of the award under section 12 (2) was served on the claimant on 29th March, 1941, by affixture. The appellant alleged that thereafter he filed on 10th September, 1941, an application asking for a reference under section 18 of the Act. This was disbelieved by the Collector as well as by the learned Subordinate Judge and there is no reason for us to differ from the conclusion of facts. But the appellant certainly filed an application for reference on 25th September, 1941, which was received by the Collector on 26th September, 1941. This application is beyond six months from the date of the Collector's award dated 12th March, 1941. Under section 18 the proviso prescribing limitation is as follows :

"Provided that every such application shall be made—(*a*) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award ; (*b*) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section 2, or within six months from the date of the Collector's award, whichever period shall first expire."

If the Collector had given effect to this proviso and refused to make a reference on that ground, no Court could have interfered with that order of refusal. In *Abdul Satar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[1], a Full Bench of the Madras High Court has held that the High Court has no power to revise the order of a Collector acting under the provisions of the Land Acquisition Act, refusing to make a reference to the Court under section 18 in a matter upon which he had passed an award.

But in this case the Collector has made a reference to the Court of the Subordinate Judge, and in the letter accompanying the reference statement which is expressly made part of the reference, the Collector has pointed out that the application under section 18 by the petitioner is out of time, having been made more than six months from the date of the award. The question that arises for determination in this case is whether in these circumstances the learned Subordinate Judge to whom the reference was made had jurisdiction to consider the question of limitation. According to the learned Counsel for the appellant, once the Collector makes a reference, the Court to which the reference is made is precluded from going into the question

1. (1923) 46 M.L.J. 209 : I.L.R. 47 Mad. 357 (F.B.).

whether the application is barred by limitation. The learned Counsel contends that the scope of the enquiry by the Court to which the reference is made is limited by section 21 to a consideration of the interests of the persons affected by the objection, and he further argues that this does not include a consideration of this question of limitation. It is also pointed out that under section 19 which states what is to be contained in the reference statement by the Collector, there is nothing to indicate that the question of limitation is to be referred to the Court. In support of this argument, the learned Counsel for the appellant has cited *Secretary of State for India in Council* v. *Bhagwan Prasad*[1]. That decision lays down that when a reference has been made under section 18 of the Land Acquisition Act, the Court has no jurisdiction to consider whether the application in pursuance of which it was made was made within the period of limitation or not. Mukerji, J., in that case states :

> "If we remember the scheme of the Act as declared by their Lordships of the Privy Council in *Ezra's case* already quoted, the Collector is the agent or mouthpiece of the Government."

It appears to us with all respect that the learned Judge came to the above conclusion on a misreading of *Ezra* v. *Secretary of State for India*[2]. What their Lordships of the Privy Council appear to have stated in that case is that an officer who holds an enquiry into the necessity for an acquisition is acting on behalf of the Government. In *Abdul Satar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[3], a Full Bench of this High Court, after considering *Ezra* v. *Secretary of State for India*[2], stated as follows :

> "In *Ezra* v. *Secretary of State*[2], the Privy Council has decided that the Collector, exercising functions under the Land Acquisition Act down to the point when he gives what is called his award, is acting only in an advisory capacity and is not exercising any judicial function at all; but in these later cases which I have referred to, it is pointed out, and I think correctly pointed out, that when he acts under Part III of which section 18 forms part, he is acting in a different capacity, because he has there to decide certain things; he has to send the case to the District Court if certain provisions in that section have been complied with, one of which is the question of time, that is to say, he has to decide whether the application is barred or not and in doing so, in my judgment, he acts judicially."

It is clear from the above that when the Land Acquisition Officer purports to act under Part III of the Act he acts as a judicial officer and not merely as an agent or mouthpiece of the Government. In *Sri Venkateswaraswami Varu* v. *Sub-Collector, Bezwada*[4], Kuppuswami Aiyar, J., in considering the question whether a Court when dealing with a belated application referred to it under section 18 of the Act by the Collector can go into the question of limitation, held the view that the Court could not go into that question. The learned Judge refers to *Abdul Satar Sahib* v. *Special Deputy Collector, Vizagapatam Harbour Acquisition*[3], and then observes as follows :

> "From these observations it is clear that it is the duty of the Collector before he makes the reference to decide on the materials before him whether he should make the reference or not, and if he decides to make and does make a reference, it is not open to the Land Acquisition Court to go behind it. If it is not open to the High Court or any other authority to interfere when the Land Acquisition Officer refuses to make a reference, his decision must be equally final when he decides to make and does make a reference."

The case of *Secretary of State for India in Council* v. *Bhagwan Prasad*,[1] and *Sri Venkateswaraswami Varu* v. *Sub-Collector, Bezwada*[4], are not quite on all fours with the facts in the present case. In *Secretary of State for India in Council* v. *Bhagwan Prasad*[1] the Collector who made the reference did not leave open the question of limitation for decision by the Court. In *Sri Venkateswaraswami Varu* v. *Sub-Collector, Bezwada*[4], the learned Judge states that the question of limitation was raised by the Collector in a separate letter dated 7th December, 1937, after making a reference by order dated 24th November, 1937. It was possible, therefore, that the learned Judge did not consider the letter to form part of the reference made earlier. In *Mahadeo Krishna* v. *Mamlatdar of Alibag*[5], a Bench of the Bombay High Court held that the Court is not debarred

1. (1929) I.L.R. 52 All. 96.
2. (1905) L.R. 32 I.A. 93 : I.L.R. 32 Cal. 605 (P.C.).
3. (1923) 46 M.L.J. 209 : I.L.R. 47 Mad. 357 (F.B.).
4. (1943) 1 M.L.J. 66.
5. I.L.R. (1944) Bom. 90.

from satisfying itself that the reference, which it is called upon to hear, (a reference made to it under section 18 of the Land Acquisition Act), is a valid reference, and could therefore go into the question whether the reference is barred by limitation. We agree with the opinion expressed by Beaumont, C.J., who delivered the judgment in that case. The reasoning adopted by the learned Judges in that case is as follows:

"The basis of the appellant's argument is that the Collector acting under section 18 is not a Court, or at any rate not a Court subordinate to the District Court or to this Court, and that the Court cannot interfere with his decision either in appeal or in revision. That, no doubt, is true, but that is not really the position. The Collector has power to make a reference on certain specified conditions. The first condition is that there shall be a written application by a person interested who has not accepted the award, the second condition is as to the nature of the objections which may be taken, and the third condition is as to the time within which the application shall be made. It seems to me that the court is bound to satisfy (itself) that the reference made by the Collector complies with the specified conditions, so as to give the court jurisdiction to hear the reference. It is not a question of the Court sitting in appeal or revision on the decision of the Collector; it is a question of the Court satisfying itself that the reference made under the Act is one which it is required to hear. If the reference does not comply with the terms of the Act, then the Court cannot entertain it. I have myself some difficulty in seeing on what principle the Court is to be debarred from satisfying itself that the reference, which it is called upon to hear, is a valid reference. I am in entire agreement with the view expressed by Mr. Justice Chandavarkar that it is the duty of the Court to see that the statutory conditions have been complied with. In my opinion, therefore, the learned Assistant Judge was right in dismissing the reference on the ground that it was out of time."

We would like to add that under section 21 it is competent for a Court to consider the interests of persons affected by the objection, and if such interests are likely to be affected adversely or otherwise by limitation, it follows that the Court has necessarily to take that into account in considering the interests of persons when the decision of the question of limitation necessarily affects the question of the correct amount of compensation. We may add that when a question of limitation arises in an objection to the amount of compensation it is eminently desirable that the Collector who cannot be completely disinterested in such a case should refer the question of limitation to the Court. We are, therefore, of opinion that the Court has power, when a reference is made under section 18 of the Land Acquisition Act, to go into the question of limitation, all the more so in a case like the present, where the Collector himself has included the question of limitation as part of the reference in his letter accompanying the reference and has not decided the question himself. We agree with the learned Subordinate Judge that the application in the present case was barred by limitation and that the reference was rightly rejected on that account.

As regards the valuation in this case, very little material is placed before the Court for arriving at a proper decision. The property concerned, a house with its site, was purchased by the appellant in a Court auction in 1938 as decree-holder for a sum of Rs. 10,001 which is the amount that is awarded subsequently by the Land Acquisition Officer as compensation together with the statutory 15 per cent. It is stated that the notification under section 4 (1) in this case was in the year 1940. It is the appropriate price of the property on that date that matters. The only evidence let in on the appellant's side is the oral evidence of his clerk and also certain sale deeds Exs. P-1 to P-4 stated to be of neighbouring properties. The oral evidence is not very helpful, as this witness admits that he does not know what rent was fetched by the property acquired. It is quite possible that this information as regards the rent fetched by the property has been kept back because it would be unfavourable to the appellant. This witness, however, states that the municipal assessment on the property is about Rs. 3 to Rs. 4 per half year. This information by itself cannot give any correct idea of the rent. As regards the sale deeds, Exs. P-2 and P-3 are the nearest in date to the date of the notification under scetion 4 (1). But these documents are not very helpful. In taking these documents into consideration as evidence of the value of the acquired property, one has also to know the value of the building situated on each of those properties covered by those sale deeds, in comparison with the value of the building on the acquired property. Without

some information as to the condition and construction of the buildings it is not possible to infer from the mere extents given in Exs. P-1 to P-4 what would be a proper value of the acquired property. It is argued that the price fetched at the Court auction must be deemed to be a low price and not a proper price. But that would depend upon whether the appellant as decree-holder was forced to purchase that property or not. As to this, there is no evidence also. It is, therefore, to be assumed that the property fetched its market value at the Court auction sale.

For these reasons the finding given by the learned Subordinate Judge that the value awarded by the Land Acquisition Officer is a fair and equitable one has to be upheld. In the result, the appeal is dismissed with costs.

B.V.V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CHANDRASEKHARA AIYAR.

Rayalla Ramappa and others .. *Petitioners.**

Civil Procedure Code (V of 1908), Order 41-A (Madras), rules 1 and 2—Provision for production of printed copies of judgment—If mandatory—Power of Court to dispense with production of requisite number of printed copies of judgment appealed against.

The Court has power to dispense with the production of the twelve printed copies of the judgment appealed against so long as a certified copy of the judgment is there. Order 41-A, rule 1 (Madras) is only a modification to the rules contained in Order 41, rule 1 of the Civil Procedure Code. The power to dispense with the production of copies of judgment contained in Order 41, rule 1 of the Civil Procedure Code is not taken away but continues.

Jami Kurmanna, In re, (1945) 1 M.L.J. 268, dissented from.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to dispense with the production of the twelve printed copies of judgment of the lower Court and to permit the same to be filed herein as soon as received in A. A. O. No. 632 of 1945, preferred to the High Court against the order of the District Court of Bellary dated 3rd August, 1945, and made in E. P. No. 63 of 1944 (in O. S. No. 44 of 1942, Sub-Court, Bellary; O. S. No. 6 of 1944, District Court, Anantapur; O. S. No. 31 of 1944, Sub-Court, Anantapur).

A. Bhujanga Rao and *D. R. Krishna Rao* for Petitioners.

The Court made the following

ORDER.—There is a decision of my learned brother, Byers, J., that the production of the printed copies of the judgment is mandatory and the Court has no power to dispense with production. The decision is reported in the case of *Jami Kurmanna*[1]. With great respect to my learned brother, I disagree from the view he has taken. Order 41, rule 1, provides that:

"the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded."

If the Court has power to dispense with the production of the judgment even where one copy of the judgment had to be filed, it stands to reason to hold that it has power to dispense with production of these printed judgments so long as a certified copy of the judgment is there. Order 41-A, rule 1, states:

"The rules contained in Order 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order."

The power contained in Order 41, rule 1, is not taken away but continues. The production of the printed copies of the judgment is dispensed with.

K.S. ——— *Petition allowed.*

* C. M. P. No. 5402 of 1945. 12th November, 1945.

1. (1945) 1 M.L.J. 268.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Yarlagadda Venkanna .. *Appellant**

v.

Ramineni Kotayya .. *Respondent.*

Civil Procedure Code (V of 1908), section 48 (2) (a)—Plea of fraud of judgment-debtor—If can be raised for the first time at the appellate stage of execution proceedings.

Though as a general rule a plea of fraud has to be raised at the earliest stage of a proceeding, and all that has to be said should be said fully and at once, yet slightly different considerations arise when applying the provisions of sub-section (2) of section 48 of the Civil Procedure Code. It is a case of being able to show even at the eleventh hour and afterwards that the time limit laid down by section 48 should not prevail where the conduct of the judgment-debtor is such as to have prevented the execution of the decree within twelve years. Hence, a plea of fraud on the part of the judgment-debtor could be raised for the first time in the appellate stage of the execution proceedings where the decree-holder had in spite of his diligence been unable to execute his decree by reason of the fraudulent transfer by the judgment-debtor of his property to his own relations.

Appeal against the order of the Court of the Subordinate Judge, Bapatla, dated 2nd November, 1944, in A. S. No. 232 of 1944, preferred against the order of the Court of the District Munsiff, Bapatla, dated 6th July, 1944, in E. P. Nil. of 1944, in O. S. No. 1006 of 1931.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

N. Suryanarayana and *N. C. Raghavan* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of execution proceedings following a decree passed dated 3rd March, 1932, for Rs. 2,150 being damages due from the judgment-debtor for breach of contract. A number of execution petitions were filed, the last one being disposed of on 17th December, 1943. It was dismissed on failure of the decree-holder to file certain papers. The execution petition out of which this appeal arises was filed on 22nd April, 1944, and was therefore outside the period of twelve years provided by section 48 of the Civil Procedure Code although within three years from the date of disposal of the execution petition above-mentioned. The District Munsiff considering these facts found that the present execution petition could not be considered to be a continuation of the 1943 petition which had been plainly dismissed for default, and that, as it was outside the period of twelve years, it was time barred. He therefore dismissed it.

On appeal the Subordinate Judge allowed evidence to be given of fraud in the sense of section 48 (2) (*a*) on behalf of the decree-holder. He felt entitled to do so on the authority of *Ramanathan Chettiar* v. *Mohideen Sahib*[1], where a Bench decided that evidence of fraud could be received and the plea taken even on appeal although it had not been specifically raised in the lower Court. On this authority therefore he allowed the appeal, held that an enquiry should be made into with regard to the allegations of fraud and to other matters which could be raised, and ordered the execution petition to be restored and disposed of in the light of the observations.

In this Court it is argued that the Subordinate Judge's interpretation of *Ramanathan Chettiar* v. *Mohideen Sahib*[1], was superficial in that it is clear from that judgment that although the plea of fraud had not been specifically raised in the lower Court there was enough on the record to show that the judgment-debtor had been guilty of fraud. In this case it is urged that the word fraud has never been mentioned in any Court except the appellate Court, and that, if the well-known principles with regard to amending records by adding a plea of fraud at a later stage are to be followed, then in these circumstances consideration of fraud was too late and that the appeal should not have been allowed by the Subordinate Judge.

It is true as Mulla points out at page 600 of his commentary on the Code of Civil Procedure :

---

* A. A. O. No. 25 of 1945. 26th October, 1945.

1. (1924) 47 M.L.J. 428.

"It is a universal practice except in the most exceptional circumstances not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance."

He is saying this in commenting on Order 6, rule 17 of the Code of Civil Procedure, which deals with amendment of pleadings. Naturally where one party is making allegations against another he should say all that he desires to say fully and at once in order that the other side may mete the case put up against him. In my opinion however different considerations arise when applying the provisions of sub-section 2 of section 48. Section 48 sets a time-limit on execution. In order to prevent a dishonest and fraudulent debtor from preventing the execution of the decree for the period of twelve years it says that if fraud can be shown then the time-limit may be extended. It is not a question of making specific allegations in a plaint or written statement against the reputation or character of the opposite side. It is a case of being able to show even at the eleventh hour and afterwards that the time-limit laid down by section 48 should not prevail where the conduct of the judgment-debtor is such as to have prevented the execution of the decree within the twelve years. It is said that:

"Judges ought to take a broad view of conduct deliberately adopted by judgment-debtors with a view to defeating and delaying the just payment of their debts by frivolous and futile objections which are dishonest upon the face of them." (See *Lalta Prasad* v. *Suraj Kumar*[1].)

In the present case there is nothing to show that the decree-holder was at any time wanting in diligence except perhaps that the last execution petition failed for want of papers which were required. That may or may not show a technical failure on his part but at any rate there can be little doubt that although he obtained a money decree in 1932 for damages for breach of contract on the judgment-debtor's part he has been utterly unable to touch one pie since that date. The allegations against the judgment-debtor are that he sold all his immoveable properties to his maternal uncle in 1933 within a year of the decree and that that uncle thereafter in no less than 7 or 8 years filed process after process against the unhappy decree-holder in an endeavour to prevent his laying his hands on the property of the judgment-debtor.

Certainly from 1933 to 1939 because of this pretended alienation by the judgment-debtor, the decree-holder was utterly unable to execute his decree. In these circumstances and taking the broad view mentioned above, I think that the decision of the learned Subordinate Judge was correct both from a legal and from a commonsense point of view. The execution petition will now be reconsidered by the District Munsiff who will hear all the objections which can be raised by both sides to each other's conduct and decide the matter according to law.

This appeal is dismissed. Having regard to the fact that the plea of fraud was not raised before the District Munsiff and the fact that the case relied upon by the appellate Judge can be distinguished on the facts, I think there should be no order as to costs. The whole matter really arises out of the decree-holder's not preparing all his artillery when he first presented the execution petition. Had he raised fraud then, there would have been none of this further litigation.

(Leave refused).

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Gudivada Suryanarayana .. *Appellant**

v.

Tadikonda Alavandararao and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), sections 8 and 9—Renewal of promissory note—Amount due under previous note not scaled down—Suit on later note—Right of debtor to relief.

---

1. (1922) I.L.R. 44 All. 319.

* Appeal No. 213 of 1944. 7th August, 1945.

It is well settled that a debt incurred after the commencement of Madras Act IV of 1938 cannot be scaled down except in accordance with section 13 of that Act. But it is also well settled that in a suit on such a debt the defendant may plead that the document executed after the commencement of the Act was a mere voucher acknowledging a debt incurred prior to the commencement of the Act to which sections 8 or 9 of that Act would apply. If so much is pleaded and established, the excess over the amount due under the prior document on applying sections 8 and 9 of the Act may be treated as an amount in respect of which there is a failure of consideration. Where the creditor went to the debtors on the last date of limitation for the preceding note and persuaded them to execute a fresh note for the full amount due without taking into account the relief due under the Act, and then sued on the later note for the full amount,

Held, that there was failure of consideration to the extent to which the promissory note amount exceeded the amount due on a proper scaling down of the debt and that the debtor could be made liable only for the amount which would have been due by him on a proper scaling down of the debt as on the date of the execution of the suit promissory note.

Appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in O. S. No. 22 of 1942, dated 29th November, 1943.

K. Kameswara Rao for Appellant.

A. V. Viswanatha Sastri for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.—The appellant was the first defendant in a suit on a promissory note Ex. P-1 executed on the 18th February, 1939, by defendants 1 and 2 in favour of the deceased first plaintiff for Rs. 17,195-2-0. This promissory note was executed after the commencement of the Madras Act IV of 1938 in discharge of an earlier promissory note Ex. P-2 dated the 19th February, 1936, for Rs. 12,240-10-0 which except for Rs. 35 cash was a renewal of a still earlier promissory note of 1930 the principal of which was Rs. 6,000. The appellant is admittedly an agriculturist. He claimed that the suit promissory note was executed in circumstances which give a basis for various pleas, one being failure of consideration and another being coercion. He also advanced a plea under the Usurious Loans Act.

It is well settled that a debt incurred after the commencement of Madras Act IV of 1938 cannot be scaled down except in accordance with section 13 of that Act. But it is also well settled that in a suit on such a debt the defendant may plead that the document executed after the commencement of the Act was a mere voucher acknowledging a debt incurred prior to the commencement of the Act to which section 8 or section 9 of that Act would apply. If so much is pleaded and established, the excess over the amount due under the prior document on applying sections 8 and 9 of the Act may be treated as an amount in respect of which there is a failure of consideration; that is to say, with reference to a debt incurred after the commencement of the Act, the debtor if he seeks relief directly under the Act must rely only on section 13; but if he can rely on a plea under the general law, he may in a proper case indirectly get a benefit which would not be available to him in the absence of such a special plea and evidence to support it.

Turning to the circumstances in which the suit promissory note was executed, we find evidence that the first plaintiff came to the debtors on the last day of limitation for the preceding note and persuaded them to execute the fresh note for the full amount due without taking into account the relief due under the Act, because the first plaintiff undertook to collect only the amount due under the Act and because there was some talk about a credit being due by reason of the profits of a contract. There is also some evidence that the first plaintiff brought pressure upon the first defendant by threatening to sue and by threatening also to execute other decrees which he had obtained against the first defendant. It is well established that on the date when the first defendant executed this renewed promissory note, he had established his right in other proceedings between himself and the first plaintiff to the relief given under Madras Act IV of 1938 to agriculturists. The learned Subordinate Judge has rejected all this evidence about the circumstances in which the promissory note came to be executed. But it seems to us most probable that the evidence is true. The witnesses who support the first defendant are the two surviving attestors to the promissory note one being the local postmaster and the other the

village munsiff. They do not appear to be witnesses anxious to favour the first defendant. Seeing that the first defendant knew that he was entitled to relief under the Act, it is not very likely that he would have signed this promissory note for a sum of Rs. 17,195-2-0 when the principal would be reduced by the application of the Act to Rs. 6,035-4-0, unless there had been some understanding between the parties that the relief to which he was entitled would in any case be given to him. There is no evidence of any such forbearance to sue on the part of the plaintiff as would amount to a consideration for the excess amount stipulated in the promissory note. *Prima facie* therefore we have a promissory note executed for more than Rs. 17,000 when both parties must have been fully aware that the amount due on a proper application of the law was something slightly in excess of Rs. 6,000. It seems most probable that, this being the last day of limitation, the creditor was in a position to insist on his debtor executing this promissory note as a voucher or acknowledgment with a view to the precise amount being settled at some future date. If that is so there is a failure of consideration to the extent to which the promissory note amount exceeds the amount due on a proper scaling down of the debt.

There is no appeal on behalf of the second defendant and no evidence of the circumstances under which he came to sign the promissory note. In view of our conclusion on this plea, the further plea under the Usurious Loans Act becomes of minor importance, but we must state that we do not agree with the conclusion of the learned Subordinate Judge on this issue. Clearly, the suit promissory note provides for the payment of compound interest and though the plaintiff has had the wisdom not to claim compound interest in his plaint that fact will not remove the contract from the purview of section 3 of the Usurious Loans Act as amended in Madras. It is also quite clear that the first defendant is an agriculturist by calling and the contract would therefore have to be deemed to be an usurious contract liable to be reopened with reference to its antecedent history. As a result of our finding that there has been a failure of consideration it is unnecessary to consider the question of relief under the Usurious Loans Act any further. The amount which would have been due on a proper scaling down of the debt as on the date of the execution of the suit promissory note is Rs. 6,035-4-0 with interest at $6\frac{1}{4}$ per cent. from 1st October, 1937. There is a failure of consideration for the excess amount. The appeal is allowed and the plaintiff will have a decree so far as the first defendant is concerned for the above amount, the appellant being entitled to full costs in appeal and the parties paying and receiving proportionate costs in the trial Court.

B.V.V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. SIDNEY WADSWORTH, *Officiating Chief Justice* AND MR. JUSTICE KOMAN.

Bathai Bagyalakshmi Ammal .. *Appellant**

v.

Thoppai Bappu Aiyar (died) and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 47—Applicability—" Between the parties to the suit "—Interpretation—Conflict in the suit—Necessity—Defendants sailing together and supporting each other—Conflict in execution—Appeal—Maintainability—Powers of High Court in revision—Abuse of powers by the executing Court—Interference.

It is necessary that there should have been a conflict in the suit between the parties in order that the decision of the question arising in execution between them could come under section 47, Civil Procedure Code.

In a partition suit, the appellant got under a compromise a decree against her husband's family declaring her right to the usufructuary mortgage interest in two items of property. The respondent, the appellant's father, though a party to the suit was not a party opposed to the appellant. On the other hand they were sailing together and supporting each other in the suit. In an application for the execution of her decree, the appellant, between whom and the respondent dis

* L. P. A. No. 18 of 1945. 11th September, 1945.

putes had arisen by then, was able to obtain delivery of possession of the two items of property from the respondent in whose possession they were. The respondent's application to the executing Court for their re-delivery was dismissed. On appeal,

Held, that in the circumstances, the case did not fall under section 47, Civil Procedure Code and the appeal was not maintainable.

Held, further, that though the High Court was ordinarily reluctant to use its powers under section 115 of the Civil Procedure Code when there is a simple remedy by way of suit, inasmuch as the powers of the executing Court had been clearly abused it was justified in directing the executing Court to re-deliver the land to the respondent and referring the parties to a separate suit to decide the title in the land.

Appeal under clause 15 of the Letters Patent against the judgment and order of the Hon'ble Mr. Justice Chandrasekhara Aiyar dated 12th January, 1945, in A. A. O. No. 283 of 1944, preferred to the High Court against the order of the Court of the Subordinate Judge of Madura, dated the 13th January, 1944, and made in E. A. No. 413 of 1943 in E. P. No. 78 of 1943 in O. S. No. 117 of 1932.

T. R. Srinivasan for Appellant.

D. Ramaswami Aiyangar and *C. K. Ramalingam* for Respondents.

The Judgment of the Court was delivered by

The Officiating Chief Justice.—The appellant here was the 20th defendant in a partition suit and is the daughter of the respondent (21st defendant in the trial Court). By 'respondent' we refer to the original respondent who is now dead and is represented by his legal representatives, the second and third respondents. The 20th defendant was the wife of the third defendant, one of the coparceners. She was in the suit claiming certain items of property as her own and her father, the respondent, was claiming certain other items of property as his own. The trial Court disallowed the claims of both the appellant and the respondent. They joined together in appealing to this Court against that decision. The appeal was Appeal No. 101 of 1937. In their memorandum of appeal there is an assertion that items 10 and 11 of Schedule C, with which we are now concerned, were purchased with the stridhanam funds of the present appellant. These two items are usufructuary mortgage rights and it is common ground that the lands covered by these usufructuary mortgages were being managed by the respondent for the appellant. It is also common ground now, though the fact was not revealed during the proceedings in the partition suit and the appeal therefrom, that the present respondent purchased the equity of redemption in respect of these two items from the owner, a third party. It is alleged that the mortgage covering these two items was redeemed by the payment of the amount due to the husband of the present appellant, the receipt being Ex. P-6 dated the 20th March, 1935. That allegation is denied by the appellant and the appellant alleges that the purchase of the equity of redemption was made on her behalf with her money by her father, the respondent. These allegations regarding the ownership of the equity of redemption and the discharge of the mortgage were not placed before the Court either at the trial or in the appeal in the partition suit.

When the matter was pending in appeal before this Court, there was a compromise between the present appellant and the members of her husband's family. The respondent was not a party to that compromise. The result of the compromise was a decree declaring that the appellant was entitled to items 10 and 11 of schedule C and also to other items with which we are not now concerned. There is nothing in this decree to indicate that the appellant was not in possession of the items decreed to her or that she was entitled under the decree to get possession from anybody else. The respondent prosecuted his own appeal after this compromise and he failed.

After the termination of the proceedings in appeal, there seems to have been disputes between the appellant and the respondent. The respondent had filed a suit on behalf of the appellant claiming rent for these lands from the tenant and got a decree; and in a second suit for possession he had been appointed receiver. While he was holding possession of these lands as receiver, the appellant filed an execution petition in which she claimed possession of the lands by virtue of the

compromise decree in the partition suit. She obtained permission from the Court which appointed the receiver to execute her decree against the receiver, and of this application for permission the respondent certainly had notice. He had, however, no notice of the main execution petition, and the appellant without opposition succeeded in getting delivery of possession. Thereupon the respondent filed an application for re-delivery and it was in the proceedings for re-delivery that all the facts regarding the purchase of the equity of redemption and the allegation of the discharge of the usufructuary mortgage and the further allegation that the purchase was *benami* for the appellant, were for the first time brought to the notice of the Court.

The executing Court, while conceding that the compromise decree in execution of which possession had been delivered did not provide for delivery of possession at all, somehow came to the conclusion that by reason of the averment in the memorandum of appeal regarding the purchase of the items with the stridhanam money of the present appellant, this decree which declared the right of the appellant to items 10 and 11 of schedule C which were usufructuary mortgages, somehow or other became transmuted into a decree recognising the appellant's full title in the property including her right as holder of the equity of redemption. Having arrived at this startling conclusion, the learned trial Judge came to a decision on such materials as were available regarding the real ownership of these lands and on the strength of that decision dismissed the petition for re-delivery.

The matter was taken up in appeal by the present respondent in Appeal Against Order No. 283 of 1944, which was heard by Chandrasekhara Aiyar, J. The learned Judge went into the preliminary objection as to the maintainability of the appeal. The objection was that the appellant and the respondent were supporting each other as co-defendants in the partition suit, each of them claiming in fact a decree against the family, and there was no conflict of interest between them right up to the termination of the appeal; it was therefore contended on the strength of the decision in *Bapanna Garu* v. *Jagga Rao Garu*[1], applying the Full Bench decision in *Annamalai* v. *Ramaswami*[2] that there was no matter arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree. Chandrasekhara Aiyar, J., held that there is no rule that the contest or conflict should have been in existence from the very beginning, and if it arises in any stage of the suit and relates to the execution of the decree and a Court is called upon to decide it as between the persons who are parties to the suit, section 47 comes into play as was held in *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[3] and the learned Judge allowed the appeal and remanded the petition for a proper consideration of all the evidence available regarding the transaction between the parties.

The passage in *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[3] which deals with this question runs as follows:

> "In the case for instance of a partition suit the judgment-debtors may very well find their interests opposed, when delivery is attempted, although up to the final decree they had no cause for complaint against each other and similarly in administrative or partnership suits. We can see no reason for acceding to the suggestion that we should limit the scope of section 47 in the way suggested, when to do so would exclude from its purview the decision of many of the questions, which must inevitably arise only after the decree and when the result would be to frustrate the object of the section recognised by the Privy Council in *Prosunno Kumar Sanyal* v. *Das Sanyal*[4], the cheap and speedy settlement of all disputes at the stage of execution."

The question which the learned Judges had to decide in that case was one relating to the order in which items of property belonging to the various defendants in a mortgage suit should be sold, the dispute between them being put forward for the first time in the course of execution. This case was considered in the referring judgment in *Annamalai* v. *Ramaswami*[5]. At page 443, the referring Judges say:

1. (1943) 1 M.L.J. 271.
2. (1941) 1 M.L.J. 45: I.L.R. (1941) Mad. 438 (F.B.).
3. (1923) 45 M.L.J. 478.
4. (1892) L.R. 19 I.A. 166: I.L.R. 19 Cal. 683 (P.C.).
5. (1941) 1 M.L.J. 45: I.L.R. (1941) Mad. 438 (F.B.).

"In *Vedaviasa Ayyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[1] the question arose between two defendants in a mortgage suit as to whose property should be sold first. There was a conflict between the two defendants *inter se* in the suit itself and this was held to raise a question under section 47, Civil Procedure Code"

and a similar explanation of this case is found at the top of page 444 in the same judgment in a quotation from a decision of Madhavan Nair, J. It is no doubt true that the decision in *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[1] does not in terms proceed on the basis that the conflict between the defendants interested in various items was a conflict in the suit; but it might well have been in the minds of the learned Judges that when there is a mortgage right claimed against various items in the enjoyment of various defendants, there is from this very nature of the claim a contest between the co-defendants which will only come to a head after the right of the mortgagee has been established; and that may be considered a ground for differentiating such cases from those in which there is no shadow of conflict between co-defendants in the suit itself.

A Bench consisting of the learned Chief Justice and Lakshmana Rao, J., had in a very recent case—*Bapanna Garu* v. *Jagga Rao Garu*[2]—to deal with the case of a dispute between two co-decree-holders in which the judgment-debtor had no concern. That was a dispute as to which of the two decree-holders was entitled to money in the hands of a receiver. The decision in *Vedaviasa Aiyar* v. *The Madura Hindu Labha Nidhi, Ltd.*,[1] does not appear to have been quoted before the learned Judges, but a rather similar decision—*Mangayya* v. *Sriramulu*[3] was cited and the learned Judges criticised the view taken in that case that the expression "between parties to suit" in section 47 does not necessarily mean between parties who are plaintiff and defendant respectively in the suit; and they observed that this decision cannot be followed, the question now under discussion being settled by the Full Bench which decided *Annamalai* v. *Ramaswami*[4]. It seems to us that we are bound by this decision which interprets the Full Bench as having settled the question whether it is necessary that there should have been a conflict in the suit between the parties in order that the decision of the question arising in execution between them could come under section 47 of the Code of Civil Procedure.

On the facts of the present case it is manifest that there was no conflict whatever either in the suit or in the appeal therefrom between the present appellant and the respondent. They were sailing together and supporting each other. Nor was there any decree passed in favour of the present appellant against the respondent. What she got was a decree against her husband's family recognising her right to the usufructuary mortgage interest in the items with which we are now concerned. No doubt the respondent was a party to that suit and is bound by that decree, but he was not a party opposed to the present appellant; he was supporting her in her claim. We are therefore unable to agree with our learned brother that this is a case falling under section 47 of the Code of Civil Procedure and we consider that the appeal was not maintainable.

We are however asked by Mr. Ramaswami Ayyangar for the respondent to exercise our powers under section 115 of the Code of Civil Procedure in order to prevent the present appellant from stealing a march in future litigation by resting on the position resulting from an order which the executing Court had no jurisdiction to make. No doubt this Court is ordinarily reluctant to use its powers under section 115 of the Code of Civil Procedure when there is a simple remedy by way of suit, as in most cases of claim proceedings; but we consider that the powers of the executing Court have been clearly abused in this case and we are also of the opinion that the executing Court, having itself conceded that there was no decree for the delivery of the property, should straightaway have ordered re-delivery and left the parties to fight out in a proper proceeding the question of their rights in the land. The decree in favour of the appellant is certainly not one which recognises anything more than her right to retain the usufructuary mortgage interest

1. (1923) 45 M.L.J. 478.
2. (1943) 1 M.L.J. 271.
3. (1913) 24 M.L.J. 477.
4. (1941) 1 M.L.J. 45 : I.L.R. (1941) Mad. 43 (F.B.).

described as items 10 and 11 in schedule C to the plaint. The equity of redemption in that mortgage was never in suit, nor was there anything in the decree to justify the conclusion that the present appellant was found entitled to the equity of redemption as against the respondent. In our opinion the executing Court had no jurisdiction to order delivery of possession at all, and, having wrongly delivered possession, it was its plain duty on an application for re-delivery to give back the land to the person wrongfully dispossessed and leave the parties to agitate their rights in a proper proceeding.

We therefore set aside the order passed by Chandrasekhara Aiyar, J., remanding the case for further enquiry and in revision we direct the executing Court to re-deliver the land to the respondent from whom it was taken and we refer the parties to a separate suit to decide the title in the land.

As to costs we think it equitable to allow the respondent his costs in the lower Court and direct each party to bear his or her costs in this Court.

V.P.S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BELL.

Sirigini Venkatarama Mohandas being minor, by mother and next friend Sirigini Suganavathi and another .. *Petitioners**

v.

Kamini Kondiah and others .. *Respondents.*

Court-Fees Act (VII of 1870), section 17—Person obtaining under a settlement deed different properties subject to various leases—Some of the lessees failing or refusing to attorn—Single suit for ejectment—Court-fee payable —"Distinct subjects"—Test.

A person who became the owner of certain properties by reason of a settlement deed executed by his father on entering upon them found various lessees in occupation of different parts under tenancies created by the settlor. Some of the tenants refused or neglected to attorn to the new owner who filed a single suit against them for ejectment and mesne profits till date of delivery of possession.

Held, the suit in the circumstances comprised a number of 'subjects' as required by section 17 of the Court-fees Act and the plaint will be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable. The plaintiff was seeking—it may be similar relief against the various defendants—but not the same relief.

Kishorilal Roy v. *Sharut Chander Mazumdar*, (1882) I.L.R. 8 Cal. 593 (F.B.) considered; *Nando Kumar Nasker* v. *Banomali Gayan*, (1902) I.L.R. 29 Cal. 871, *Umabhai* v. *Vithal*, (1908) I.L.R. 33 Bom. 293 and *Govindaraja Mudaliar* v. *Alagappa Thambiran*, (1926) I.L.R. 49 Mad. 836 : 51 M.L.J. 194 (F.B.) distinguished.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Ellore, dated 3rd March, 1945 in O.S. No. 115 of 1944 (Check Slip No. 639 VII-I issued by the Court-fee Examiner).

T. S. Narasinga Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M. Appa Rao* for Respondents.

The Court delivered the following

JUDGMENT.—The question which arises is as to the liability or otherwise of the petitioners to pay enhanced Court fee under the provisions of section 17 of the Court Fees Act. The section says that where a suit embraces two or more distinct subjects, the plaint shall be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable under the Act.

The suit in the present case was brought by two plaintiffs against a number of defendants. It was alleged that the first plaintiff became the owner of the suit properties by reason of a settlement deed executed by his father. At the time the first plaintiff was a minor and his mother and guardian, the second plaintiff, entered upon the properties only to find the defendants in occupation under tenancies created by the settlor. There were other persons also in occupation of other properties comprised in the settlement, but these made no demur about

* C. R. P. No. 561 of 1945. 25th October, 1945.

attorning to the plaintiffs as tenants. The defendants in the suit apparently refused or neglected to do so.

The plaint, paragraph 3, says :

"The first plaintiff is the owner of the immoveable properties mentioned in the schedule hereto annexed."

The schedule has not been printed, but evidently there is a large number of properties and the extent of each is set out together with the names of the defendants in occupation of them. The plaint alleges that these defendants are trespassers and that they are bound to pay mesne profits for past years and compensation until date of delivery of possession. The plaintiff claims an aggregate sum of Rs. 30,893-10-9 being the total of the amounts claimed against each of the defendants. The plaintiff prayed among other things for delivery of possession and for ejectment of the defendants.

Does a suit in these circumstances comprise a number of "subjects" as required by section 17 ? Authorities have been cited to show that there is nothing amiss in joining a number of defendants in a suit for ejectment and there would appear to be authority for saying that where a plaintiff says that he is the owner of certain land on which the defendants are trespassing, he may have one cause of action against them. Is that the same thing as saying that there is only one subject ? I do not find the authorities at all clear. It has been said in *Kishorilal Roy* v. *Sharut Chander Muzumdar*,[1] that the meaning of the word "subject" is obscure and incapable of precise definition. In the present case it is not clear from the plaint before me whether the plaintiff is claiming in respect of an extent of land on which exist a number of trespassers each sitting on different tracts or whether the suit is in respect of a number of different properties of which the first plaintiff, no doubt, may be the owner but upon which the occupants have come in different ways. I am told that the latter is more likely the case, because the properties in some cases are in different villages.

It seems to me on the whole that, bearing in mind the words of the plaint the plaintiff is seeking—it may be similar relief against these defendants—but not the same relief. There appears to be no legal inter-connection between the defendants. They have nothing in common with each other and they are joined merely as a matter of convenience. Against each defendant the plaintiff will have to prove a similar but a separate case. The amount claimed is different against each defendant. If the plaintiff is right, each defendant committed a different although a similar act of trespass. As the correction slip points out there must probably also be a different question of costs arising in each case and depending upon each defendant's attitude.

On the whole I have come to the conclusion that this case is not quite the simple case which is considered in such authorities as *Nando Kumar Nasker* v. *Banomali Gayan*,[2] *Umabhai* v. *Vithal*,[3] and *Govindaraja Mudaliar* v. *Alagappa Thambiran*,[4] where the heir to an estate has come upon it to find it trespassed upon and occupied by a number of individuals and in which he brings a suit against them all for ejectment, proves his title and asks that they should be turned off the land by the Court. In this case I am told that each of these defendants in fact was in the position of being a tenant to the plaintiff's predecessor-in-title. Why the benefit of these tenancy agreements was not passed on to these plaintiffs is not easy to see. I am grateful to learned Counsel for the petitioners who has argued the case very forcibly and ably for his clients, but I think on the facts I must hold that the contention that section 17 applies is right. This case does contain more subjects than one although the plaintiffs claim under one settlement deed.

The petition is therefore dismissed. The petitioners will pay costs to Government.

K.S. — *Petition dismissed.*

1. (1882) I.L.R. 8 Cal. 593 (F.B.).
2. (1902) I.L.R. 29 Cal. 871.
3. (1908) I.L.R. 33 Bom. 293.
4. (1926) 51 M.L.J. 194 : I.L.R. 49 Mad. 836 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE CLARK.

In the matter of *The Indian Companies Act* (*VII of* 1913)
and
In the matter of *The Deccan Commercial Bank, Ltd.* (*in liquidation*).

Aga Mahomed Khaleel Shirodi (since deceased) .. *Petitioner.*

Cyril Gill and others, Joint Official Liquidators .. *Applicants**.

v.

Mohamed Nawaz Khan .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 58—*Claim to property attached in execution of order against contributory in winding up of company—Scope—Summary nature of investigation—Questions as to fraudulent nature of transfer to person in possession—Cannot be gone into—Proper remedy is to proceed by way of regular suit under Order* 21, *rule* 63 *to have the transfer declared fraudulent.*

When the liquidators of a company attached certain shares belonging to a contributory it was found that the son of the contributory was registered as the holder of those shares and in actual possession of them. The liquidators sought to prove that the transfer by the contributory to his son was a fraudulent one,

Held : In such proceedings the executing Court is concerned only with the question of the possession of the property and cannot embark upon enquiries involving a decision as to the real as opposed to the apparent title to the property. The proper course for the liquidators to follow is to proceed by way of a regular suit under rule 63 of Order 21 of the Code of Civil Procedure if they have reason to believe that the transfer by the contributory was for any reason ineffective, inoperative and void as against the creditors in the winding-up.

Ramaswami Chettiar v. *Mallappa Reddiar*, (1920) 39 M.L.J. 350 : I.L.R. 43 Mad. 760, distinguished.

C. Krishnaswami instructed by *King and Patridge* for Applicants.

C. R. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of the Master passed in execution. The applicants are the Official Liquidators of the Deccan Commercial Bank, Ltd. One Khan Sahib Md. Munir Khan Sahib Bahadur was a contributory of this company. He was placed on the list of contributories and an order was obtained against him for payment of the amount due from him in that respect. These execution proceedings are by the Official Liquidators to execute that order. This contributory died in January 1945 at which time he was on the list of contributories and the order for payment had been obtained against him. His son one Md. Nawaz Khan was brought on the record of the execution proceedings as his legal representative. Execution was sought by attachment of certain shares by way of an order prohibiting the Secretary of the Egmore Benefit Fund, Flowers Road, Egmore, Madras, from paying Mohamed Nawaz Khan the amount of shares standing in the name of his deceased father Khan Sahib Md. Munir Khan Sahib Bahadur, and it is stated in the execution petition that these shares "have recently been transferred and now stand in the name of the said Md. Nawaz Khan." But it is admitted before me and it was so stated by the Master in his order that the shares were in fact transferred by the deceased contributory to his son, the present respondent, on the 21st July, 1941, *i.e.*, over three years before his death.

The respondent filed objection to the application for execution on the ground that he was the registered owner of the shares and was entitled thereto on his own account. It is admitted that the shares are so registered and that he, the respondent, is in possession of the certificates. The Master has found that the respondent "is in actual possession of these shares." On this finding he rejected the application for attachment.

* Appl. No. 1723 of 1945 in O.P. No. 168 of 1938. 2nd November, 1945.

Objection is taken to this decision of the Master on the ground that he should have heard and considered evidence in support of the liquidators' allegation that the transfer by the deceased contributory to the present respondent was a fraudulent preference. Reliance has been placed on the case of *Ramaswami Chettiar* v. *Mallappa Reddiar*[1]. The Master has taken the view that this case has no application in the circumstances of this case and I agree with him. In that case it was held that an attaching creditor defendant in a claim suit under Order 21, rule 63 may properly raise a defence that the transfer to the plaintiff was void as being in fraud of creditors. That furnishes no authority for the proposition that a similar plea may be raised by a petitioning creditor in the execution proceedings.

Under Order 21, rule 58, Civil Procedure Code, when an objection is made to an attachment, as was the case here, the Court shall proceed to investigate the claim. Under rule 59, the claimant or objector is required to adduce evidence "to show that at the date of the attachment he had some interest in, or was possessed of the property attached." I have already observed that it is admitted in this case that the respondent is possessed of the shares and that they are registered in his name in the company's register. In these circumstances no useful purpose could possibly have been served by the Master's allowing the Liquidators' application to call evidence on the point. Indeed I do not understand from his counsel that it was the point on which he wished to call evidence. He wished to call evidence to establish that the transfer by the deceased contributory to his son, the present respondent, was a fraudulent transfer. Evidence on that point would, in my view, be inadmissible in view of the relevant provisions of Order 21, dealing with the summary investigation of claims in execution. In such proceedings, the executing Court is concerned only with the question of the possession of the property and should not and cannot embark upon enquiries involving a decision as to the real, as opposed to the apparent, title to the property. (Vide *Najimunnessa Bibi* v. *Nacharuddin Sardar*[2] and *Ramaswami Goundan* v. *Karuppa Mudali*[3].) There is of course nothing to prevent the liquidators from proceeding by way of a regular suit under the provisions of rule 63 and that seems to me to be the proper course to follow, if they have reason to believe that this transfer by the deceased contributory to the respondent is for any reason ineffective, inoperative and void as against the creditors of this winding up.

The appeal is accordingly dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

P. Lakshmiah .. *Petitioner.**

Motor Vehicle Rules (1938), *rule* 220—*Offence under—Stopping of a bus in front of a hotel to pick up passengers from there.*

If a driver of a motor bus stops the bus in front of a hotel so that he might pick up some passengers from the hotel, it is 'loitering' on the road and makes the driver guilty of an offence under rule 220 of the Motor Vehicle Rules.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate, Chandragiri, dated 30th April, 1945, in C. A. No. 19 of 1945 (C. C. No. 1079 of 1944, Sub-Magistrate's Court, Tiruttani).

K. Kalyanasundaram and *R. Santanam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

---

1. (1920) 39 M.L.J. 350 : I.L.R. 43 Mad. 760.
2. (1923) I.L.R. 51 Cal. 548.
3. (1927) 54 M.L.J. 321.

*Cr. R. C. No. 644 of 1945. (Cr. R. P. No. 602 of 1945). 9th November, 1945.

The Court made the following

ORDER.—What is urged for the petitioner is that the offence under rule 220 of the Motor Vehicle Rules, requires that the delay must be of such a character as to prevent the men from reaching the destination in time. That is not what is stated there. It is true a driver is expected to reach the destination in time. But what is made an offence is loitering on the road. According to the Concise Oxford Dictionary, "Loitering" means lingering on the way or hanging about. In this case according to the finding of both the Courts, the driver was stopping the bus in front of a hotel so that he might pick up some passengers from there. This is certainly lingering on the way. It is not the petitioner's case that it was a stopping place at which he could stop for the purpose of taking passengers. Waiting for the passengers, who had gone to the hotel, for nearly 10 or 15 minutes is certainly lingering on the way and the petitioner is therefore guilty under rule 220. It is certainly annoying to the other passengers in the bus if they are made to wait in front of a hotel like this merely to pick up passengers who are expected to come from the hotel and board the bus. The petitioner was rightly convicted. In the circumstances of the case I should think the punishment is lenient. The petition is dismissed.

K.C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

The Public Prosecutor, Madras .. *Petitioner**

v.

Pingali Mallikarjana Kota Paneswara Rao .. *Respondent.*

Criminal Procedure Code (V of 1898), section 562—Applicability—Offence punishable under section 409, Indian Penal Code.

The offence punishable under section 409, Indian Penal Code, is one punishable with transportation for life and hence, on a conviction under that section, the accused could not be dealt with under section 562, Criminal Procedure Code.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate, Bandar, in C. C. No. 126 of 1944.

The Public Prosecutor (*V. L. Ethiraj*) in person.

B. S. Ramachandra Rao for Accused.

The Court made the following

ORDER.—This is a revision petition filed by the Public Prosecutor with regard to the sentence passed by the Additional First Class Magistrate of Bandar in C. C. No. 126 of 1944 on his file. The accused was convicted of an offence punishable under section 409, Indian Penal Code and found guilty and dealt with under section 562 of the Criminal Procedure Code. The offence is one punishable with transportation for life and therefore the case could not be dealt with under section 562 of the Criminal Procedure Code. The sentence therefore is illegal and has to be set aside. Taking into consideration, however, the fact that the accused who is only 19 years of age and who was employed in the Rationing office, has not only lost his job but lost all his chances of being employed in Government service in future, and as he also has returned the money, it will be sufficient if he is sentenced to imprisonment till the rising of the Court. He is accordingly so sentenced. The sentence will be undergone in the Court of the Additional First Class Magistrate of Bandar.

V.S. —— *Petition allowed.*

*Cr. R. C. No. 473 of 1945. 8th November, 1945.
(Cr. R. P. No. 435 of 1945).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

The Public Prosecutor .. *Appellant**

v.

Sheik Masoom and others .. *Respondents.*

Criminal Procedure Code (V of 1898), sections 348 and 349—Joint trial of four accused of whom one was an old offender convicted for an offence under Chapter XVII of the Indian Penal Code—All found guilty—Sub-Magistrate sending papers to Sub-Divisional Magistrate under section 349 as he could not award proper sentence on the old offender—Legality—Proper procedure—Jurisdiction of the Sub-Divisional Magistrate to try and acquit all the accused.

Four accused were jointly tried by a Sub-Magistrate for offences punishable under section 380, Indian Penal Code, so far as accused 1 and 2 were concerned and for offences punishable under sections 410 and 411 of the Indian Penal Code, so far as accused 3 and 4 were concerned in respect of the same articles and found guilty. As the first accused was an old offender who had been convicted for an offence under Chapter XVII of the Indian Penal Code, the Sub-Magistrate sent the papers to the Sub-Divisional Magistrate under section 349, Criminal Procedure Code, who acquitted all the accused. On an appeal against the acquittal,

Held, that the Sub-Divisional Magistrate had no jurisdiction to try the case and acquit the accused inasmuch as the Sub-Magistrate ought to have committed the accused to sessions under section 348 of the Criminal Procedure Code, if he thought that he could not pass adequate sentence and should not have taken action under section 349, Criminal Procedure Code. The Sub-Divisional Magistrate could have jurisdiction to acquit the accused only if the papers could have been sent to him under section 349.

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondents (accused) by the Court of the Sub-Divisional Magistrate, Narasaraopet, in C.C. No. 109 of 1945 on his file (C.C. No. 1238 of 1944, Stationary Sub-Magistrate, Narasaraopet).

The Public Prosecutor (*V. L. Ethiraj*) in person.

V. T. Rangaswami Aiyangar, *Kalyanasundaram Aiyar* and *G. Gopalaswami* for Accused.

The Court delivered the following

JUDGMENT.—This is an appeal against the order of acquittal of the Sub-Divisional Magistrate of Narasaraopet in C.C. No. 109 of 1945 on his file. The four accused were originally tried by the Sub-Magistrate of Narasaraopet for offences punishable under section 380, Indian Penal Code, so far as accused 1 and 2 were concerned and for offences punishable under sections 410 and 411 of the Indian Penal Code, so far as accused 3 and 4 were concerned, in respect of the same articles. They were all tried together and found guilty of the offences with which they were charged ; but as the first accused was an old offender who had been convicted for an offence under the provisions of Chapter XVII of the Indian Penal Code, there was also a charge against him under section 75 of the Indian Penal Code. The Magistrate felt that he could not award the proper sentence on the first accused and so sent the papers to the Sub-Divisional Magistrate of Narasaraopet under section 349 of the Criminal Procedure Code. This Magistrate acquitted all the accused, and it is against this order of acquittal that this appeal has been filed.

It is rightly urged for the Crown that the Sub-Divisional Magistrate, Narasaraopet, had no jurisdiction to try the case and acquit the accused inasmuch as the Sub-Magistrate ought to have committed the accused to sessions under section 348 of the Criminal Procedure Code, if he thought that he could not pass the adequate sentence and should not have taken action under section 349. The Sub-Divisional Magistrate, Narasaraopet, could have jurisdiction to acquit the accused only if the papers could have been sent to him under section 349. Section 349 is a general section which applies to all offences whereas section 348 applies only to persons who have been convicted of an offence punishable under Chapter XII or Chapter

---

* Crl. Appeal No. 509 of 1945. 8th November, 1945.

XVII of the Indian Penal Code in any prior case, and according to section 348 (2),

"When any person is committed to the Court of Session or High Court under sub-sec. (1), any other person accused jointly with him in the same inquiry or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209."

In this case the Magistrate knew that the first accused had been convicted of an offence punishable under Chapter XVII of the Indian Penal Code, and he also knew that none of the accused could be discharged but would have to be convicted. At this stage he should not have sent the papers under section 349 of the Criminal Procedure Code to the Sub-Divisional Magistrate. The proper course for him would be to commit the accused to Sessions. This is also clear from rule 95 of the Criminal Rules of Practice. As the Magistrate therefore had no jurisdiction to send the papers and should have committed the accused to Sessions under section 348, the Sub-Divisional Magistrate had no jurisdiction to acquit the accused.

I accordingly set aside the order of acquittal and send the papers to the Sub-Magistrate of Narasaraopet for taking action under section 348 of the Criminal Procedure Code. If the Magistrae who tried the case originally is not there, there may have to be a *de novo* enquiry.

V.S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AIYAR.

Kumariah Naicker and six others .. *Accused**

v.

Chinna Naicker .. *Complainant.*

Criminal Procedure Code (V of 1898), section 203—Complaint thrown out under—Second complaint if barred.

The fact that a previous complaint was thrown out under section 203 of the Criminal Procedure Code is no bar to the entertainment of a second complaint. But if the filing of a second complaint will amount to an abuse of process of the Court the complaint ought not to be taken on file.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Additional District Magistrate of Ramnad at Madura in his letter, dated 8th May, 1945.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

The Court made the following

ORDER.—This is a reference by the Additional District Magistrate of Ramnad with regard to C.C. No. 64 of 1945 on the file of the Additional Sub-Magistrate of Aruppukottah. Notice has been given to the complainant and he has not appeared in this Court. He filed a complaint for dacoity, theft etc., aginst the accused. That was investigated by the police and was finally thrown out under section 203 of the Criminal Procedure Code. This was on the 23rd December, 1944. On the 18th January, 1945, the complainant presented another complaint against the same accused on the same facts. The accused objected to the preferring of the complaint. The Magistrate held that the dismissal of the prior complaint under section 203 was not a bar to the entertainment of the second complaint. The Additional District Magistrate is of the opinion that the order of the Sub-Magistrate was unsustainable as he had no jurisdiction to entertain the second complaint as the prior complaint had been dismissed and refers the case under section 438 of the Criminal Procedure Code to quash the order of the Sub-Magistrate taking the complaint on file. The fact that a previous complaint was thrown out under section 203 of the Criminal Procedure Code is no bar to the entertainment of the second complaint. But the question for consideration is whether on the facts stated it will not be an abuse of process to take up the second complaint

* Crl. R. C. No. 422 of 1945. 2nd August, 1945.
(Case Referred No. 29 of 1945).

on file and proceed with it in the circumstances of this case. The original complaint was for theft, dacoity, etc., and in the second complaint the charge of dacoity and theft was not pressed. There is nothing to indicate that there was no proper investigation on the previous complaint or that there was any necessity for investigating the second complaint. Even with regard to the offences in respect of which the second complaint was presented the Magistrate who dismissed the earlier complaint has pointed out that there was no disinterested witness to prove the complainant's allegation. The Magistrate was of the opinion that the evidence likely to be available could not possibly lead to a conviction. Nothing was alleged by the complainant in the second complaint which would justify the Magistrate modifying that view. No additional witness had been cited in the second complaint, nor as pointed out by the Additional Magistrate, was it alleged that any other kind of evidence had been discovered or was likely to be forthcoming. In these circumstances to entertain the second complaint would be an abuse of the process of the Court and the order entertaining the complaint is quashed.

K.S. —— *Order quashed.*

[PRIVY COUNCIL.]

PRESENT:—LORDS RUSSELL OF KILLOWEN, PORTER, SIMONDS AND GODDARD AND SIR MADHAVAN NAIR.

Daniel Youth .. *Appellant**

v.

The King

Criminal trial—Joint trials—Reception of evidence only admissible against one of the accused—Practice—Discretion—Interference by the Privy Council where there is evidence on which the jury was entitled to convict—Practice.

In all joint trials no doubt, the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in England has always been in a joint trial to admit such evidence, leaving it to the presiding judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible. The question of joint or several trials however has always been left to the discretion of the presiding Judge. The discretion must of course be a judicial discretion. Where in the circumstances, it would not be possible to override the Judge's discretion had he been asked to try the prisoners separately and refused to do so, much less would it be possible to interfere where such request was not made.

Where there was evidence against the accused on which the jury were entitled to convict, its strength is not a matter for their Lordships of the Privy Council to determine: the jury are sole Judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done.

G. R. Blanco White and *Harris Walker* for Appellant.

Kenelm Preedy for the King.

The judgment of the Court was delivered by

LORD PORTER.—Their Lordships have already indicated that they would humbly advise His Majesty that this appeal should be dismissed and that they would give their reasons for tendering such advice in due course. Those reasons are set out below. The appellant and his wife Amelia Youth were jointly charged on indictment in the Supreme Court of Turks and Caicos Islands before His Honour S. T. B. Sanguinetti and a jury of twelve with the murder of one Poland Smith in the Parish of Saint George at the Bight of Blue Hills. Both pleaded not guilty but were convicted and sentenced to death: the wife's sentence however was afterwards commuted to penal servitude for life. The husband alone appealed first to the Supreme Court of Judicature of Jamaica and subsequently by special leave to His Majesty in Council. The appellant lived in a small settlement on Caicos Island called Thomas Stubbs Settlement which appears to have consisted of only three houses: one inhabited by the appellant and his wife, the next by the deceased

* P. C. A. No. 12 of 1944. 13th November, 1944.

man, his wife and family, and the third by the dead man's mother-in-law. There was ample evidence of bad blood between the appellant and the deceased and indeed that the appellant threatened to get him out of the Settlement and had been heard to say with reference to him "Something is going to happen serious." Some miles to the west of this Settlement lies another and larger Settlement known as Bight Settlement; a road or path joins the two Settlements, and from this road a track leads to the seashore which is about half to two-thirds of a mile distant. The dead man was accustomed to pay a visit each Sunday afternoon to friends at the Bight Settlement and on Sunday, 5th July, 1942, as usual he left his house about 5 o'clock and visited one James Pratt, who lived two or three miles away He arrived about 6 P.M., left about 10 P.M., but never reached his home. On Tuesday, 7th July, 1942, his dead body was found floating in the sea some distance to the west of the Bight Settlement. Death apparently was not due to drowning but to a combination of injuries which had been inflicted upon him: they consisted of three scalp wounds towards the back of the head, a jagged wound below the left ear and a cut through the right side of the lower jaw penetrating through the inferior maxilla. Though the last-mentioned wound would cause profuse bleeding, the blood would not necessarily be on the assailant. Later the same day at a spot lying just off the track mentioned above a sandy clearing was found bloodstained and trampled and marked by foot-prints. The clearing was about one mile from Thomas Stubbs Settlement and 21 chains from the shore.

The bloodstains continued for about 200 yards to the beach and on the beach were found two sets of footprints as if two persons walked face to face sideways to the sea. The two sets were about two feet apart heavily indented, as if a weight was being carried and between them at one spot was a collection of blood. One set was larger than the other. According to the evidence the appellant and his wife left home a long time after the dead man, walking in the direction which he had taken towards the Bight Settlement. At sunrise the following morning Amelia Youth was seen coming from the direction in which she and her husband had gone the previous evening and shortly afterwards the appellant came from the same direction towards his house. That same morning a farmer living at Bight Settlement saw two persons coming eastwards along the beach about 4 A.M. After they saw him the two turned back in the direction of Stubbs Settlement, but he was unable to identify who they were. On the same day there was found on the floor of the Youths' house a machete without a handle which could have caused the wound on the right-hand side of the dead man's face, but no blood was in fact found on it. The two accused were seen by the police about 3 P.M. on 7th July and the appellant then had a bruise over his left cheek, scratches on his throat, and a dark stain on his shirt. The stain was not from blood and is immaterial. The explanation given by the appellant and his wife as to the other injuries was that they had had a quarrel the night before in the course of which he had struck his face against the room door and she had scratched him. After this interview the appellant, who was wearing an old blue shirt and pants, asked leave to go home to change his clothes and started on his way but was called back and thereupon ran away and hid himself. He was subsequently arrested the same day, but again escaped and was finally re-arrested on 11th July. Meanwhile his wife was arrested and kept in custody.

Later on, *viz.*, on 22nd July, in consequence of certain information which had been received one of the local constables and a clerk went to the Youths' house and searched in a field about 40 feet beyond a wall which stood east of the house, and was itself 15 to 20 feet from the house. The appellant used this field for planting corn, potatoes, and such like purposes and in it the constable found a clump of dry bush which had apparently been gathered together and upon which a few small stones had been placed, Underneath he found two cave holes going down vertically into the rock and in them were two sticks or clubs. The larger one had upon it diffused stains of human blood. The smaller was also smeared with blood,

but it was impossible to say whether this blood was or was not human blood as the quantity found was two small to enable a conclusion to be reached. Either of the two sticks might have caused the injury at the back of the head inasmuch as the wounds found on the deceased man, except that which cut through the jaw, must have been caused by a blunt instrument or by the head coming in contact with a hard surface, *e.g.*, stone or wood. The matters set out above constitute the evidence admissible against the appellant. The information however which led to the discovery of the sticks or clubs came from the female accused and is contained in the statement set out below:

"On Saturday, 4th July, 1942, I and my husband Daniel Youth who is commonly called General had a little fight, and he knocked his face just above his eyes on the side of the house, all these scratches that he has on his face now were not there on Saturday. My husband did not sleep home on Sunday night 5th July, 1942, he went out just about sunset, and he never came home until Monday morning. About 10 A.M. my husband on Monday morning left to go for conchs, and he returned home at or about 1 o'clock. My husband then said to me you see Poland home? I said to him I am not looking out for Poland. He replied to me you wont see that damn bitch back in Thomas Stubbs, he said I done murder his ass out last night and dragged him in the sea. I did not believe him at first so he went to eastward and he brought a lignumvitae stick a big stick full up with blood and he said this is the stick that I killed him with. I said to him General you should not have killed Poland out like that and he said to me you aint glad, that damn bitch out of Thomas Stubbs so you can live in peace and he tell me if I talk it he was going to carry me cross to northward and kill me and put me in the hole he said just how he murdered Poland he would murder me the same way. The same day when we heard that Poland Smith was murdered he sent Rosina my sister in the field to get some corn and while she was gone he tell me dontmind what James Pratt and them tell me I must tell them nothing because if I do he will still kill me how he tell me before. He carried the stick in the cave hole to eastward of the house in the field. Sunday night he had on one short old pair of oznaburg pants and one old blue shirt and waistcoat. He told me he lay way for Poland down in the road and the first stroke he gave him was on his head to knock all his senses away from him. I am telling you how to get the stick its on the east side of my house in the banana bottom some potatoe slips and then there are some rocks and near that is the cave hole.

(Sgd.) AMELIA YOUTH."

The same advocate had been assigned to defend both prisoners. They were jointly charged and jointly tried. No application was made that their trials might be separated. When however the statement was tendered in evidence it was objected to by defending counsel, the grounds of objection being that persons whether under arrest or not should not have statements elicited from them. This objection was overruled by the presiding Judge, but the jury were warned with the greatest care both then and subsequently and in the summing up that this statement was not evidence against the husband and must not be taken into consideration in determining his guilt or innocence. Neither of the accused elected to give evidence and both were found guilty of murder. Daniel Youth alone appealed to the Supreme Court of Jamaica, his contention being that the statement was inadmissible against him and whatever warning may have been given it must have so influenced the minds of the jury as to have made his trial unfair.

His appeal was dismissed on 30th May, 1943, on the ground that the statement was admissible for and against the wife and that the jury had been warned that they were on no account to take the statement as evidence against the husband. Their Lordships find themselves in agreement with the Supreme Court. There was evidence against the appellant on which the jury were entitled to convict. Its strength is not a matter for their Lordships to determine: the jury are sole judges unless some step has been taken which is contrary to natural justice or some grave and substantial injustice has been done. In the present case, it is said that the admission of the statement must necessarily have so influenced the mind of the jury that the appellant has been deprived of the substance of a fair trial. Their Lordships would point out the statement was evidence which might be regarded either as favourable or unfavourable to Amelia Youth and as such it was imperative for the prosecution to put it in evidence. It is true no doubt that in all joint trials the mind of the jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to admit such evidence, leaving it to the presid-

ing Judge to warn the jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible. In truth the real complaint in the present case is that the prisoners were tried jointly and not separately—the submission being that they should have been tried separately and the husband's case taken first. The question of joint or several trials however has always been left to the discretion of the presiding Judge. The discretion must of course be a judicial one, but here their Lordships would point out that no application was made to sever the trials nor in their view would it have been possible to override the Judge's discretion had he been asked to try the prisoners separately and refused to do so. Much less would it have been possible to interfere where such request was not made. So far their Lorsdhips have been dealing with the matter as if no specific provisions were in force which had a bearing upon it.

The provisions, however, of the Evidence Ordinance 3 of 1901 of the Revised Laws of the Turks and Caicos Islands, 1909, are relevant to its consideration. Two of those provisions must be quoted, and are as follows :

> "99. In all criminal proceedings the accused, and the husband or wife of the accused, as the case may be, may be called as a witness, but subject to the following provisions : (*i*) The accused shall not be called as a witness without his consent ; (*ii*) the wife or husband of the accused shall not be called as a witness without the consent of the accused, except in any case in which the wife or husband might have been compelled to give evidence before the commencement of this ordinance.
>
> * * * * * * *
>
> "102. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other, and except in the cases mentioned in sections 99 and 100."

The appellant relied upon these sections, and, in particular on section 102 as precluding the giving in evidence of this statement of Amelia Youth in the present proceedings. As to 99, it was said that the statement became evidence when it was put in, and could not be put in without the husband's consent, and as to 102, it was said that the statement contained a communication made by the husband and was therefore inadmissible since no consent had been given. Their Lordships do not find themselves able to accept these arguments. Both sections appear in a group of provisions entitled "Production and Effect of Evidence," and under the sub-heading "Witnesses." From these headings it would appear that the sections deal and deal only with witnesses called to give evidence in Court. But apart from this consideration section 99, where it says "the wife . . . of the accused . . . shall not be called as a witness without his consent," points to the same result. Moreover, the section has, in their Lordships' view, no bearing on a case where husband and wife are being jointly tried. In such a case, on the one hand the wife cannot be called as a witness against the husband, by reason of the wording of the section, and on the other she cannot be prevented from giving evidence on her own behalf, nor can a statement she has made be shut out, since it is evidence against her. So in the case of section 102. A statement made outside the witness box is obviously inadmissible against anyone except the person making it, but the section cannot be intended to prevent the police or indeed any third person outside a Court of law listening to the statement of a wife suspected of a crime or the wife from excusing herself or explaining the circumstances, even though the explanation or excuse may implicate her husband. The section is dealing with evidence given in the witness-box, and means that material disclosures cannot there be given in evidence against an accused. The statement under consideration was neither given in evidence nor disclosed as evidence against the husband. It was admissible for and against the wife, and was rightly used as evidence in her case. The appellant has no cause of complaint under the sections. The statement was not put in against him, but was properly used in the case of his co-accused, and the

jury were carefully warned against paying any regard to it in his case. In their Lordships' view, therefore, the sections do not avail the appellant. They will humbly advise His Majesty that the appeal should be dismissed.

Solicitors for Appellant—*Druces & Attlee.*

Solicitors for the King—*Burchells.*

V.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE YAHYA ALI.

S. R. M. Ramanujam Pillai .. *Petitioner**

v.

Ramaswami Pillai and others .. *Respondents.*

Court Fees Act (VII of 1870), section 7 (iv) A—Plaintiff not party to a document—Can get his relief without avoiding it—Unnecessary for him to seek cancellation—Relief on the basis that the document was not intended to be acted upon—Cannot be treated as a relief for cancellation.

In a suit by a mortgagee the plaint averred that certain prior transactions (mortgages and sales) between the defendants and third parties being nominal and never intended to be given effect to and were not binding on the plaintiff; that no consideration passed under the said documents and the recitals of consideration contained therein were false and fraudulent; that the parties to the transactions were not entitled to any rights in respect of items under those instruments and that the decree obtained by one of them in the prior suit was not valid or binding on the plaintiff. And as an alternative remedy it was urged that if the hypothecation was deemed to be valid and binding on the plaintiff, the plaintiff was willing and ready to redeem the property by paying a proportionate share of the sum due on the hypothecation bond.

Held, on the question of court-fee to be paid by the plaintiff, that unless the plaintiff was a party to a particular document and he could not get the relief he seeks without avoiding the document, it being an insuperable obstacle in his way, it was unnecessary for him to seek the cancellation of the document; and any relief he might otherwise ask for on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and effect be treated as a relief for cancellation within the meaning of section 7 (*iv*) A of the Court-Fees Act.

Bijoy Gopal Mukerji v. *Krishna Mahishi Debi*, (1907) 17 M.L.J. 154: L.R. 34 I.A. 87; I.L.R. 34 Cal. 329 (P.C.); *Unni* v. *Kunchi Ammal*, (1890) I.L.R. 14 Mad. 26; *Ramaswami* v. *Rangachari*, (1940) 1 M.L.J. 32: I.L.R. (1940) Mad. 259 (F.B.); *Vellayya* v. *Ramaswami*, (1939) 2 M.L.J. 400: I.L.R. (1940) Mad. 73; and *Adinarayana* v. *Rattamma*, (1944) 1 M.L.J. 497, referred to.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Melur, in O. S. No. 47 of 1944 dated 6th February, 1945.

S. Venkatesa Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this petition is whether certain reliefs in the plaint should be valued for Court-fee purposes under section 7 (*iv*) *A* as for cancellation of an instrument. The matter was considered by the lower Court on an objection raised by the Court-fee examiner and it was found that the valuation had to be made under the aforementioned provision and an additional Court-fee should be paid *ad valorem* on the amount of the mortgages and the value of the properties comprised in the sale deeds, in favour of defendants 5 and 6, mentioned in the plaint.

The suit is on a mortgage bond executed by the first defendant in plaintiff's favour on the 17th January, 1931, for Rs. 2,000. The first defendant at the time of the execution of the mortgage was the manager of a joint Hindu family consisting of himself and his brothers, defendants 2, 3 and 4. They are the sons of one Muthu Karuppa Pillai, who died shortly before the execution of the suit mortgage. During the lifetime of Muthu Karuppa Pillai he had executed on the 9th May, 1928, a mortgage in favour of the fifth defendant of item 4 in the plaint schedule. The fifth defendant is the son-in-law of Muthu Karuppa Pillai. He had also executed

*C. R. P. No. 452 of 1945. 2nd November, 1945.

in favour of the sixth defendant on the 16th August, 1928, a mortgage of items 1 to 5. On the 29th March, 1938, item 4 was sold by defendants 1 and 2 after the death of their father to the sixth defendant. The fifth defendant filed O. S. No. 54 of 1938 on the basis of the mortgage in his favour dated the 9th May, 1928, concerning item 4 and impleaded the sixth defendant therein. He impeached the validity of the mortgage and sale in favour of the sixth defendant and that suit was decreed in favour of the fifth defendant holding that those transactions were of a nominal character.

In paragraphs 7 and 11 of the plaint in this suit these facts have been recited and it is averred that the respective transactions referred to above, being nominal and never intended to be given effect to, were not binding on the plaintiff. It was also alleged that no consideration passed under the said documents and the recitals of consideration contained therein are false and fraudulent. It was urged that the fifth and sixth defendants were not entitled to any rights in respect of the respective items under these instruments. The decree obtained by the fifth defendant in O. S. No. 54 of 1938 was also attacked as not being valid or binding on the plaintiff. As an alternative remedy it was urged that if the hypothecation was deemed to be valid and binding on the plaintiff, the plaintiff was willing and ready to redeem item 4 by paying a proportionate share of the sum due on the hypothecation bond in favour of the fifth defendant. In paragraph 15 it was stated that as the decree should be binding on all the defendants therein, they were all impleaded as parties to the suit. Lastly in paragraph 18, the relief that was asked for was a preliminary decree directing the defendants to pay the amount due under the mortgage bond and "in default to sell the properties free from the claims of defendants 5 and 6, or if the Court finds that the claims of defendants 5 and 6 are in any way binding on the plaintiff to give appropriate directions to redeem items 1 to 5 of the undermentioned properties on payment of the proportionate amount due on them." With reference to the alternative relief concerning the redemption of items 1 to 5 on payment of the proportionate sum due to defendants 5 and 6, it appears that the order of the lower Court that it was admitted by the plaintiff that in addition to the court-fee paid for the suit mortgage debt, he was liable to pay court-fee in respect of the relief for redemption of the mortgage in favour of defendants 5 and 6. So the only question that remains is whether in view of the relief asked for—the sale of the suit properties free from the claims of defendants 5 and 6 in the event of default in payment of the mortgage money the court-fee paid is correct or whether, as contended by the court-fee examiner, the plaintiff is bound to pay court-fee under section 7 (iv) A on the basis of relief for the cancellation of the respective documents.

It is contended by the learned counsel for the petitioner that the principle has been well settled that where the plaintiff is not a party to an instrument, he need not ask for its cancellation; and, where he contends that the same is not valid or binding on him he is entitled to ignore it or merely state that it is not valid and binding on him. The respondent was not represented before me and since the question was of some importance, notice was ordered to the learned Government Pleader who has appeared and argued in support of the position taken up by the court-fee examiner.

The contention put forward by the learned Government Pleader are two-fold. He says that a relief of the nature asked for, namely, the sale of the hypotheca in default of payment by the judgment-debtor of the decree amount, free from all claims, was wholly unnecessary in the suit; and as that relief was over and above the relief necessary in this case, additional court-fee should be paid in respect thereof. The second contention is that the mortgagee-plaintiff is for all practical purposes a representative in interest of the mortgagor and all the transactions binding upon him or to which he was a party are binding upon the mortgagee, and hence the mortgagee should be deemed to be a party to all these transactions; and in that view he must avoid these various documents by getting them cancelled before he can get any relief free from these encumbrances.

With reference to the first contention of the learned Government Pleader, it is stated by the learned advocate for the petitioner that where the relief is merely incidental or ancillary to the claim for the recovery of mortgage money, no additional court-fee need be paid, and much less where the relief is, as conceded by the Government Pleader, wholly unnecessary. But apart from this answer, I am not impressed by the argument that this relief is wholly unnecessary. The plaintiff has set out the various transactions and the circumstances in which, according to him, they were brought about and he wanted to clear up certain clouds that may arise when at a later stage he seeks to execute the decree which he hopes to obtain in the present suit. Such a relief cannot be said to be entirely otiose or irrelevant in the suit.

The more serious contention is the second one, namely, that the mortgagee is virtually a party to those transactions. I am not impressed by this argument either. The essential relationship between a mortgagee and mortgagor in a simple mortgage is that of a creditor and debtor. While in certain matters the mortgagee may be bound by certain equities binding on the mortgagor, it cannot be said in general that he is for all purposes a successor or representative in interest of the mortgagor.

Turning to the main point in the case as to whether in the circumstances it was necessary for the plaintiff to ask for the cancellation of the various mortgages and sales referred to in the plaint and whether, even in the absence of any such express relief asked for, the plaint should be construed as one asking in substance for such relief, the matter is covered by a series of decisions of various Courts. As early as in *Unni* v. *Kunchi Ammal*[1], it was held that if a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside; they may treat it as non-existent and sue for their right as if it did not exist. The same principle was distinctly laid down by the Privy Council in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[2]. That was an action brought by a reversionary heir to set aside certain alienations made by a limited owner. The facts of that case no doubt were entirely different, but the jural basis of the principle contended for on behalf of the petitioner has been laid down in that case. Their Lordships said :

> "It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them, as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession, leaving it to the defendants to plead and (if they could) prove the circumstances, which they relied on, for shewing that the ijara or any derivative dealings with the property were not in fact voidable, but were binding on the reversionary heirs."

These two cases were referred to by a Full Bench of this Court in *Ramaswami* v. *Rangachari*[3], where, after adverting to the observations of the Judicial Committee referred to above, the learned Chief Justice said :

> "In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental but unnecessary relief. As I have indicated, there is no such prayer in the plaint and in the light of the principles explained there is no justification for implying them and then demanding a fee for it."

I may point out here that in the present plaint there is no prayer for a declaration or cancellation and on the basis of the observations of the learned Chief Justice, it has to be said that there is no justification for implying those prayers in the plaint and then demanding a fee for them.

Two more decisions of this Court may be referred to in this connection. In *Vellayya* v. *Ramaswami*[4], Wadsworth, J., had to consider the case of a creditor who brought a suit under section 53 of the Transfer of Property Act for a declaration that an alienation made by a debtor was void against the creditors. It was held that that was not a suit for the cancellation of a document securing money or pro-

1. (1890) I.L.R. 14 Mad. 26.
2. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).
3. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
4. (1939) 2 M.L.J. 470 : I.L.R. (1940) Mad. 73.

perty falling under section 7 (*iv*) A of the Court-Fees Act but that it was a suit for a declaration where no consequential relief was prayed. In that decision the learned Judge drew a clear distinction between a suit for the cancellation of an instrument and a suit for a declaration that an instrument was not binding on the plaintiff and made the following observation :

"When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto* and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy, therefore, in order to clear the way with a view to establish his title, is to get a declaration, that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed."

The next is the decision of Horwill, J., in *Adinarayana* v. *Rattamma*[1]. That was a case of a gift which was attacked as a sham and inoperative transaction and it was held that where such a deed had no legal effect, section 7 (*iv*) A of the Court-Fees Act which deals with a suit for cancellation of a document securing money or other property cannot have any application. In the course of the judgment the learned Judge referred to some of the decisions referred to above including *Unni* v. *Kunchi Ammal*[2], the Privy Council decision in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[3], the decision of the Full Bench in *Ramaswami* v. *Rangachari*[4] and the decision of Wadsworth, J., in *Vellayya* v. *Ramaswami*[5]. Referring to a certain part of the judgment of Wadsworth, J., it was pointed out by Horwill, J., that in all cases of decrees or voidable deeds it may be proper to hold that those are sought to be avoided and the suit is in substance a suit for cancellation of the decree or deeds, even though it may be framed as a suit for a declaration; but there is an exception to the general rule with regard to deeds which were intended to be inoperative and were not intended to be anything more than scraps of paper and as such had no legal effect.

The trend of decisions is therefore clearly to the effect that unless the plaintiff is a party to a particular document and he cannot get the relief he seeks without avoiding that document, it being an insuperable obstacle in his way, it is unnecessary for him to seek the cancellation of the document; and any relief he may otherwise ask for on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and in effect be treated as a relief for cancellation within the meaning of section 7 (*iv*) A of the Court-Fees Act. Having regard to this position the finding of the learned District Munsiff cannot be upheld. The petition is allowed.

The costs of this petition will abide the result of the suit.

V.P.S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUPPUSWAMI AIYAR.

D. Narasimha Aiyar .. *Petitioner.**

Madras Traffic Rules, rule 39 (1) (b)—*Riding on the carrier of a cycle pedalled by another—Offence.*

A person riding not on the saddle but on the carrier behind the saddle of a cycle pedalled by another is guilty of contravening rule 39 (1) (*b*) of the Madras Traffic Rules which prohibits riding a cycle in any other manner than on the saddle. Etymologically it will be correct to say that such a person is riding the cycle but not riding it sitting on the saddle.

1. (1944) 1 M.L.J. 497.
2. (1890) I.L.R. 14 Mad. 26.
3. (1907) 17 M.L.J. 154 : L.R. 34 I.A. 87 : I.L.R. 34 Cal. 329 (P.C.).
4. (1940) 1 M.L.J. 32 : I.L.R. (1940) Mad. 259 (F.B.).
5. (1939) 2 M.L.J. 400 : I.L.R. (1940) Mad. 73.

* Cr. R. C. No. 835 of 1945.
(Cr. R. P. No. 779 of 1945).

23rd November, 1945.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Ariyalur, dated 27th June, 1945, in C. A. No. 27 of 1945, preferred against the order of the Court of the Stationary Second Class Sub-Magistrate, Jayakondan, dated 5th May, 1945, in C. C. No. 262 of 1945.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—Rule 39 (1) (*b*) of the Traffic Rules runs thus:

"No person shall ride a cycle on any road in any other manner than on the saddle."

Admittedly, the petitioner was riding not on the saddle but on the carrier behind the saddle and above the wheel. He is therefore guilty of the offence with which he has been charged.

What is contended is that what was intended to be prohibited was the propulsion of the wheels by moving the pedal without sitting on the saddle. That also could be said to be prohibited as it is riding in any other manner but by sitting in any place without propelling the wheels. Etymologically, it will be correct to say that the man, who is sitting on the carrier and is carried on the cycle, is riding the cycle. But then he will not be riding it sitting on the saddle.

The petitioner was rightly convicted and the sentence cannot be said to be excessive. The petition is dismissed.

K.S. — *Petition dismissed.*

[END OF VOLUME.]

perty falling under section 7 (*iv*) A of the Court-Fees Act but that it was a suit for a declaration where no consequential relief was prayed. In that decision the learned Judge drew a clear distinction between a suit for the cancellation of an instrument and a suit for a declaration that an instrument was not binding on the plaintiff and made the following observation:

"When the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void *in toto* and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for a declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled *in toto*. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy, therefore, in order to clear the way with a view to establish his title, is to get a declaration, that the decree or deed is invalid so far as he himself is concerned and he must therefore sue for such a declaration and not for the cancellation of the decree or deed."

The next is the decision of Horwill, J., in *Adinarayana* v. *Rattamma*[1]. That was a case of a gift which was attacked as a sham and inoperative transaction and it was held that where such a deed had no legal effect, section 7 (*iv*) A of the Court-Fees Act which deals with a suit for cancellation of a document securing money or other property cannot have any application. In the course of the judgment the learned Judge referred to some of the decisions referred to above including *Unni* v. *Kunchi Ammal*[2], the Privy Council decision in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*[3], the decision of the Full Bench in *Ramaswami* v. *Rangachari*[4] and the decision of Wadsworth, J., in *Vellayya* v. *Ramaswami*[5]. Referring to a certain part of the judgment of Wadsworth, J., it was pointed out by Horwill, J., that in all cases of decrees or voidable deeds it may be proper to hold that those are sought to be avoided and the suit is in substance a suit for cancellation of the decree or deeds, even though it may be framed as a suit for a declaration; but there is an exception to the general rule with regard to deeds which were intended to be inoperative and were not intended to be anything more than scraps of paper and as such had no legal effect.

The trend of decisions is therefore clearly to the effect that unless the plaintiff is a party to a particular document and he cannot get the relief he seeks without avoiding that document, it being an insuperable obstacle in his way, it is unnecessary for him to seek the cancellation of the document; and any relief he may otherwise ask for on the basis that the document was not intended to be acted upon and was inoperative cannot in substance and in effect be treated as a relief for cancellation within the meaning of section 7 (*iv*) A of the Court-Fees Act. Having regard to this position the finding of the learned District Munsiff cannot be upheld. The petition is allowed.

The costs of this petition will abide the result of the suit.

V.P.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUPPUSWAMI AIYAR.

D. Narasimha Aiyar .. *Petitioner.**

Madras Traffic Rules, rule 39 (1) (b)—*Riding on the carrier of a cycle pedalled by another—Offence.*

A person riding not on the saddle but on the carrier behind the saddle of a cycle pedalled by another is guilty of contravening rule 39 (1) (*b*) of the Madras Traffic Rules which prohibits riding a cycle in any other manner than on the saddle. Etymologically it will be correct to say that such a person is riding the cycle but not riding it sitting on the saddle.

---

1. (1944) 1 M.L.J. 497.
2. (1890) I.L.R. 14 Mad. 26.
3. (1907) 17 M.L.J. 154: L.R. 34 I.A. 87: I.L.R. 34 Cal. 329 (P.C.).
4. (1940) 1 M.L.J. 32: I.L.R. (1940) Mad. 259 (F.B.).
5. (1939) 2 M.L.J. 400: I.L.R. (1940) Mad. 73.

* Cr. R. C. No. 835 of 1945. 23rd November, 1945.
(Cr. R. P. No. 779 of 1945).

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional First Class Magistrate, Ariyalur, dated 27th June, 1945, in C. A. No. 27 of 1945, preferred against the order of the Court of the Stationary Second Class Sub-Magistrate, Jayakondan, dated 5th May, 1945, in C. C. No. 262 of 1945.

G. Gopalaswami for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—Rule 39 (1) (*b*) of the Traffic Rules runs thus :

"No person shall ride a cycle on any road in any other manner than on the saddle."

Admittedly, the petitioner was riding not on the saddle but on the carrier behind the saddle and above the wheel. He is therefore guilty of the offence with which he has been charged.

What is contended is that what was intended to be prohibited was the propulsion of the wheels by moving the pedal without sitting on the saddle. That also could be said to be prohibited as it is riding in any other manner but by sitting in any place without propelling the wheels. Etymologically, it will be correct to say that the man, who is sitting on the carrier and is carried on the cycle, is riding the cycle. But then he will not be riding it sitting on the saddle.

The petitioner was rightly convicted and the sentence cannot be said to be excessive. The petition is dismissed.

K.S. *Petition dismissed.*

[END OF VOLUME.]

GENERAL INDEX.

ADMINISTRATOR—Appointment by foreign Court—Right to maintain suit in British India—Acquisition of foreign domicile—Inference from circumstances—Undischarged bankrupt—Right to maintain suit as administrator—Suit to avoid alienations of insolvent—Leave of Insolvency Court—Presidency Towns Insolvency Act (III of 1909), S. 17—C. P. Code (V of 1908), O. 1, R. 8—Applicability ... 318

ALLUVION AND DILUVION—Lanka in Godavari river—Re-formation—Right of previous owner of land, when completed—Declaration of right—Ownership of bed of river—Test of navigability ... 27

ARBITRATION ACT (X OF 1940), Ss. 14, 31, 32 and 33—Scope—Award—Enforcement—Procedure—Application under the Act and not a separate suit is the remedy ... 98

———S. 23—Reference to arbitration in pending suit—When Court ceases to have jurisdiction to deal with the suit ... 482

———S. 33—Application to set aside award—Court-fee payable ... 536

BAIL—Appeal to Privy Council by convicted person—High Court has no power to grant bail (P.C.) ... 40

BANKER AND CUSTOMER—Trust money—Draft intended for one party taken in name of another—Beneficiary notifying claim to Bank before encashment—Suit for declaration of right to money—Right of Bank to set off—Claim for recovery of money whether necessary ... 100

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), S. 26—Member of society transferring his life insurance policies to society as security for amounts borrowed—Death of member—Sum standing to credit of member after adjustment of amounts due to society—Right of creditor of member to attach it as against claim of nominee ... 217

CERTIORARI—Supreme Court cannot issue writ to bring up order by a judge of that Court or another superior Court (P.C.) ... 314

CEYLON (STATES COUNCIL ELECTIONS) ORDER IN COUNCIL (1931)—Election petition under, to Supreme Court—Order by Judge of that Court—Supreme Court cannot issue writ to bring up such order to be quashed (P.C.) ... 314

CHRISTIAN MARRIAGE ACT (XV OF 1872), S. 88—Roman Catholic marrying Protestant wife in a Protestant Church without a dispensation as required by the Canon Law of the Church of Rome—Marriage if void as forbidden by the "personal law" of the husband—Second marriage by husband during lifetime of such wife—Offence of bigamy—Release by wife in favour of husband—If can operate as dissolution of marriage—Penal Code (XLV of 1860), S. 494 ... 80

CIVIL PROCEDURE CODE (V OF 1908), S. 11, Expl. IV—Defence which might and ought to have been raised in prior litigation between the parties (P.C.) ... 223

———S. 47— Applicability — Defendants sailing together and supporting each other—Conflict in execution—Appeal—Maintainability—Abuse of powers by executing Court—Interference by High Court in revision ... 567

———S. 47—Scope ... 544

———S. 47 and O. 21, r. 63—Scope. *See* SUCCESSION ACT, S. 361 ... 525

———S. 48—"The decree that is sought to be executed"—Appellate Court confirming decree of original Court—Date of appellate decree as starting point—Conditional decree—Application filed without fulfilling condition—Effect ... 197

———S. 48 (2) (*a*)—Plea of fraud of judgment-debtor—If can be raised for first time at appellate stage of execution proceedings ... 564

———S. 54—Decree for partition falling under—Transmission to Collector for effecting partition—Power of Court to hear objections to the partition so made or to modify it—Remedy of person aggrieved by Collector's order (F.B.) ... 62

———S. 73—Custody Court and executing Court being same—Receipt of assets—Point of time—Need for formal order—Undertaking by executing creditor to bring back money into Court—Liability for interest ... 49

———S. 80—Notice of suit to set aside revenue sale—Wrong survey number of the property sold given—Error fundamental and notice defective ... 387

———S. 100—Question not raised in written statement—If can be raised in second appeal ... 416

———S. 100—Question of law—Evidentiary value of entry in *inam* register—Question of law (P.C.) ... 352

CIV. PRO. CODE (V OF 1908)—*Contd.*

——S. 115—Order of conciliation board under Madras Debt Conciliation Act on wrong view as to law and jurisdiction—Revision ... 66

——S. 145—Security by a Hindu charging ancestral property for obtaining stay of execution of decree against a third party—Construction—Absence of personal liability—Property other than those charged cannot be proceeded against (P.C.) ... 160

——O. 1, r. 8—Applicability—Suit to avoid alienations of insolvent ... 312

——O. 12, r. 6—Partition suit—Decree being partly preliminary and partly final—Application for amendment of written statement at later stage—Maintainability ... 439

——O. 21, r. 2, O. 23, r. 3 and O. 34, r. 5—Agreement for adjustment of mortgage debt prior to preliminary decree in mortgage suit—If could be pleaded in defence to an application for final decree—Competency of Court to recognise and enforce it (P.C.) ... 367

——O. 21, rr. 6, 7 and 8—Order transferring decree passed—Execution petition to transferee Court without producing copy of the order—Dismissal without registering—Propriety—Proper procedure ... 555

——O. 21, rr. 11 and 22—Execution petition with wrong number of suit—Not in accordance with law—Prayer for issue of notice—If step in aid ... 427

——O. 21, r. 16—Defendants exonerated by petitioner not served with notice of petition—Recognition of assignment and ordering of execution—Legality ... 22

——O. 21, r. 16 and O. 34, r. 6—Order for person decree on application of assignee of mortgage decree—Appeal—Court-fee ... 87

——O. 21, rr. 46, 49 and S. 52—Applicability—Partnership—Death of partner—Suit on promissory note by—Decree against legal representatives—Decree against assets of deceased partner—Mode of enforcing—Special procedure under r. 49 if available—Interference in revision ... 531

——O. 21, r. 58—Claim to property attached in execution of order against contributory in winding up of company—Scope—Summary nature of investigation—Questions as to fraudulent nature of transfer to person in possession—Cannot be gone into—Proper remedy is to proceed by way of regular suit under O. 21, r. 63 to have the transfer declared fraudulent ... 573

——O. 21, rr. 58 and 63—Order on claim petition or decree in suit filed under r. 63 does not extend beyond execution of decree which has given rise to those proceedings (F.B.) ... 89

——O. 21, r. 89—Deposit under—Amount subject to modification by operation of Madras Act IV of 1938—Sufficiency ... 255

——O. 21, r. 89—Sale in execution of prior mortgage—Setting aside—Money advanced to set aside—Equity in favour of person advancing ... 305

——O. 21, rr. 90, 66 (2) (*b*) and 67 read with r. 54 (2)—Setting aside sale—Requirements to be proved—No mention of revenue in sale proclamation—Not a material irregularity when no separate revenue has been fixed on the portion of the estate sold—Omission to affix sale proclamation in Collector's office—Adequate publicity given to sale—Irregularity not material (P.C.) ... 259

——O. 21, rr. 99 and 103—Order dismissing decree-holder's application for removal of obstruction and delivery of possession—Failure to file suit under r. 103 within one year to establish the right to possession—Effect ... 403

——O. 23, r. 1—Plaintiff called upon to pay additional court-fee in respect of an item of property—Right to abandon that part of claim and give up a particular defendant in order to avoid paying the additional court-fee—Formal application for amendment of plaint—Not essential—Dismissal of entire suit for non-payment of deficit court-fee when plaintiff abandons part of his claim—Legality ... 473

——O. 33, r. 10—Interpretation—First charge for court-fees on the subject-matter of suit—Not confined only to that which party ordered to pay costs has recovered ... 140

——O. 34, r. 5 and S. 146—Sub-mortgagee impleaded as defendant in suit for sale brought by the original mortgagee—Right to apply for final decree ... 122

——(as amended), O. 34, rr. 7 (2) and 8—Usufructuary mortgage—Preliminary decree for redemption—Failure of mortgagor to deposit amount in time—Final decree not passed—Amount paid subsequently after three years—Validity ... 239

——O. 41, r. 27 (1) (*b*) and (2) (Madras)—Admission of documentary evidence in the appellate Court—Reasons set out in the affidavit accepted by the appellate Judge—Discretion exercised judicially ... 349

——O. 41-A (Madras), rr. 1 and 2—Provision for production of printed copies of judgment—If mandatory—Power of Court to dispense with production ... 563

CIVIL RULES OF PRACTICE (MADRAS) r. 20, Proviso—Applicability—Pleader—When can be permitted to appear against his former client or his representative ... 187

CIVIL SERVICE (CLASSIFICATION, CONTROL AND APPEAL) RULES, R. 55—Scope. *See* GOVERNMENT OF INDIA ACT, S. 240 (1) AND (3) (F.C.) ... 250

COMPANIES ACT (VII OF 1913), Ss. 30 (2) and 38—Allotment of shares by the directors and entry in the register of members—Cancellation of allotment after eight months as invalid for want of consent of the company in general meeting as required

COMPANIES ACT (1913)—*Contd.*
by the articles of association—Removal of the names of those members—Competency of the directors—Proper remedy of the company ... 432

——S. 23—Receiver appointed in debenture-holders' action—Loan on agreement to hypothecate raised under orders of Court for paying off arrears of wages of labourers and workmen—Priority (P.C.) ... 141

CONTEMPT OF COURT—Existence of other remedy—Committal for contempt—Propriety—Interference by Privy Council (P.C.) ... 356

——Party appearing in person—Reference in the heat of argument suggesting that members of Bar are in the habit of misleading the Court—If "contempt" calling for action—Remark about taxing masters questioning if what is written as considered in their order is considered at all—If amounts to contempt—Contempt proceedings—Different from ordinary criminal proceedings—Power to order costs against the crown unsuccessfully endeavouring to uphold an order committing the appellant for contempt (P.C.) ... 109

CONTEMPT OF COURTS ACT (XII OF 1926), S. 2 (3)—Failure to obey order of Chief Judge of Small Cause Court to furnish information required by S. 3 of the Mussalman Wakf Act (1923)—High Court not prohibited from taking action for contempt (P.C.) ... 356

CONTRACT—Appointment of chief agent of insurance company for a period of ten years certain—If implies a term on the part of the company to carry on it business for that period—Running of the business of the company as a "closed fund" owing to its financial condition—Termination of services of chief agent—If breach of contract entitling him to claim damages for being prevented from earning his remuneration ... 297

——Contracts for manufacture and delivery of goods by plaintiffs to defendant at Madras—Plaintiffs aware that the goods were to be sold in Australia—Import of such goods into Australia prohibited by Australian Government—Cancellation of orders—Liability of defendants to damages—Measure of damages ... 24

——Contract of agency of a life insurance company—If terminable on notice—Construction of the contract as contained in the letters between the parties—Length of reasonable notice—Claim for commission on renewal premiums after termination of agency either under the contract of agency or under the provisions of the Indian Insurance Act—Maintainability (P.C.) ... 496

CONTRACT ACT (IX OF 1872), S. 23—Complaint disclosing non-compoundable offences—Sworn statement disclosing only compoundable offences and summons issued only for those offences—Agreement to compound such offences—Validity ... 468

——S. 25 (3)—Open payments insufficient to save limitation for a debt due on a promissory note—Debtor's offer before Debt Conciliation Board to pay seven annas in the rupee rejected by creditor—Creditor if can found a claim for the barred debt based on S. 25 (3) of the Contract Act ... 405

——S. 70—Applicability. *See* RAILWAYS ACT, Ss. 11 (3) (*b*) AND 12 ... 155

——S. 72—*A* and *B* buying a site in their name and building a house on it with money belonging to their nephew *C*—*A* and *B* raising further funds to complete the building and mortgaging the property to *D* as security for the loan—*X* buying the property subject to the mortgage in a sale in execution of a money decree against *A* and *B*—*X* paying *D* the amount due on the mortgage—*C* establishing his title and recovering the property from *X*—Right of *X* to recover amount paid to *D* ... 513

——S. 202—Agency coupled with interest—Revocation—Action for damages—Maintainability ... 303

CO-OWNERS—Partial partition—Rule against—Alienee of a half share in possession of property filing suit—Another half share in the hands of another alienee—Whether suit for partition of that other half share only is maintainable ... 153

COURT-FEE & JURISDICTION—Guardian furnishing accounts to Court which appointed him and examination of same by auditors—Suit by ward on attaining majority against the guardian for recovery of sums misapplied and misappropriated—Frame of—Valuation of plaint—Basis ... 460

COURT-FEES—Mortgage decree—Assignment—Order for personal decree—Appeal against—*Ad valorem* court-fee payable—C. P. Code (V of 1908), O. 21, r. 16 and O. 34, r. 6 ... 87

COURT-FEES ACT (VII OF 1870), S. 7 (iv) A—Plaintiff not party to a document—Can get his relief without avoiding it—Unnecessary for him to seek cancellation—Relief on the basis that the document was not intended to be acted upon—Cannot be treated as a relief for cancellation ... 582

——S. 17—Person obtaining under a settlement deed different properties subject to various leases—Some of the lessees failing or refusing to attorn—Single suit for ejectment—Court-fee payable—"Distinct subjects"—Test ... 571

——Sch. II, Arts. 1 and 18—Application under S. 33, Arbitration Act, to set aside award—Court-fee payable ... 536

CRIMINAL PROCEDURE CODE (V OF 1898), S. 102—Apprehension for murder—Entry of police into house of the accused where he had bolted himself in—No duty publicly to search themselves or other respectable persons before such entry ... 249

——Ss. 103 and 165—Criminal trial—Duty of prosecution—All crown witness if to be called (P.C.) ... 486

CR. PRO. CODE (V OF 1898)—*Contd.*

——Ss. 190 (*c*), 436 and 437—Sessions Judge's direction to Magistrate to make further inquiry in order to take cognizance of a more serious offence of the accused than that for which they had been charged—Whether such an order was sustainable—Magistrate himself whether could take cognizance of the offence for which accused was not charged ... 88

——Ss. 195 (1) (*b*) and 476 and Penal Code (XLV of 1860), S. 211—Complaint to the Assistant Commissioner of Police—Charge-sheet filed—Accused discharged by Chief Presidency Magistrate—Evidence of complainant at enquiry irreconcilable with statements in the complaint—Complaint by Assistant Commissioner of Police for an offence under S. 211, Penal Code—Complaint transferred to the Third Presidency Magistrate—Third Presidency Magistrate has no jurisdiction to take cognizance of the case without a complaint from the Chief Presidency Magistrate ... 115

——S. 196-A—Prosecution under S. 120-B of the Penal Code read with r. 90-B of the Defence of India Rules (1939)—Previous sanction as required by S. 196-A, Cr. P. Code, not necessary—Effect of sub-r. (3) of r. 90-B of the Defence of India Rules ... 235

——S. 197—Prosecution of Health Officer of Municipality for abusing and beating municipal employee subordinate to it—Sanction—Necessity ... 546

——S. 203—Complaint thrown out under—Second complaint if barred ... 577

——S. 342—Questioning accused under—Proper method ... 456

——Ss. 348 and 349—Joint trial of four accused of whom one was an old offender convicted for an offence under Ch. XVII of the Penal Code—All found guilty—Sub-Magistrate sending papers to Sub-Divisional Magistrate under S. 349 as he could not award proper sentence on the old offender—Legality—Proper procedure—Jurisdiction of the Sub-Divisional Magistrate to try and acquit all the accused ... 576

——S. 403—Applicability—Convictions for offences under Ss. 147 and 148, Penal Code—Appellate Court setting it aside and remanding case for fresh disposal in respect of offences under Ss. 323 and 324—Order not sustainable as it would amount to trial for same offence ... 95

——S. 426—Scope—Bail—Grant of—Powers of High Court—Appeal to Privy Council by special leave by convicted person—High Court has no power to grant bail (P.C.) ... 40

——S. 435—Power of Additional District Magistrate in revision to direct the accused to be committed—Enquiry under Ch. XVIII, Cr. P. Code—Magistrate deciding no case made out under S. 307, Penal Code and framing charges under Ss. 147, 323 and 325, Penal Code—Additional District Magistrate competent to revise such order and direct commitment of accused to the Sessions on the charge of attempted murder ... 139

——S. 476—Scope ... 125

——S. 488—Order for maintenance in favour of wife—Husband and wife living together thereafter as such—Order, if and how far effective ... 408

——Ss. 491 and 404—Appeal against discharge under writ of *habeaus corpus*—Competency—Comparison of Indian and English law (P.C.) ... 325

——S. 562—Applicability—Offence punishable under S. 409, Penal Code ... 575

CRIMINAL TRIAL—Appeal against acquittal—Scope of the power of the High Court to review evidence (P.C.) ... 362

——Evidence—Use in appeal of evidence in respect of one offence of which the accused is acquitted as corroborative evidence of the guilt of the same accused in respect of another offence with which also he was charged and convicted—Legality—Charge of murder as against six and in addition of robbery as against the appellant and another only—Conviction of all for murder—Acquittal of the two of robbery—Appeal—Acquittal of five—Conviction of appellant alone confirmed—Use of evidence of robbery as corroborative evidence of the guilt of the appellant—Legality (P.C.) ... 486

——Joint trials—Reception of evidence only admissible against one of the accused—Practice—Discretion—Interference by the Privy Council where there is evidence on which the jury was entitled to convict—Practice (P.C.) ... 578

——Sentence—Principles to be observed in imposing when there are alternative sentences for an offence ... 547

——Sub-Divisional Magistrate to whom papers have been sent under Police Standing Order No. 157—Acts as a "Court" in making inquiries—Not competent to file as a "Court" a complaint of offence when *prima facie* case is made out—Criminal Procedure Code (V of 1898), S. 476—Scope ... 125

——Privy Council—Interference in criminal appeals—Breach of natural justice—What may amount to (P.C.) ... 446

——Wrong evaluation of evidence—Interference by Privy Council (P.C.) ... 488

CROWN GRANTS ACT (XV OF 1895)—Licence for mining operations—Registration not necessary ... 400

——S. 2—Crown grant—Construction—Confirming to grantee and his heirs as *chrotrium* a village which was to be "not alienable by gift, sale or otherwise, but in default of legal heirs" to revert to grantors—Validity of condition—Nature of interest created—Alienation—Right of successors of alienor to avoid ... 307

DEED—Construction—Power of attorney—Agency coupled with interest—Revocation of power—Breach of agreement—Action for damages—Maintainability ... 303

DEFENCE OF INDIA ACT (1939), S. 2 (1) and (2)—Relative scope and effect—R. 26 of Defence of India Rules if in conformity with powers conferred by S. 2 (1) of the Act (P.C.) ... 325

———S. 2 (5)—Scope (P.C.) ... 325

———R. 26—If in conformity with powers conferred by S. 2 (1) of the Defence of India Act—Jurisdiction of High Court to investigate the validity of orders of detention under r. 26 (P.C.) ... 325

———R. 93-B—Prosecution for offence under read with S. 120-B, I.P.C.—Previous sanction under S. 196-A, Cr. P. Code, not essential ... 235

DIVORCE ACT (VI OF 1869), S. 19 (4)—Petition by wife to declare marriage null and void on the ground of the existence of a first wife—Onus—Presumption under S. 107, Evidence Act, could not be relied upon ... 389

EVIDENCE ACT (I OF 1872), S. 30—Several accused tried for a major offence—Confession of one of a minor offence—Admissibility against other accused ... 479

———S. 107—Applicability—Petition by wife to declare marriage nullity on the ground of existence of first wife—Onus ... 389

EXECUTION — Mortgage decree— Purchaser of one of several items—Subsequent acquisition of rights under decree—Application for execution of decree for full amount—Proportionate discharge of decree—Whether can be pleaded as defence ... 544

———Stay by Appellate Court—Subsequent attachment under warrant issued prior to receipt of stay order—Validity ... 19

EXPLOSIVE SUBSTANCES ACT (VI OF 1908), Ss. 2, 4 and 5—Accused found in possession of yellow phosphorus in water in a bottle in its natural form—No inflammable substance found along with it likely to cause explosion—Intention to cause an explosion not evidenced—Conviction for offence under S. 5—Sustainability ... 414

FATAL ACCIDENTS ACT (XIII OF 1855)—Compensation received under private settlement by Hindu widow and children as dependants for death caused by fatal accident—Apportionment—Principles ... 550

FOOD GRAINS CONTROL ORDER (1942), Cls. 2 and 3 and Defence of India Rules (1939), S. 81 (4)—Possession of grain beyond 20 maunds—Conviction and the whole of grain ordered to be confiscated—Order of confiscation justified ... 172

———Cl. 3 (1)—Advance of money to be discharged by delivery of grain—Transaction is a sale—Licence, when to be obtained—Suit on such contract for recovery of the value of the grain on failure to deliver—Relief that could be given ... 193

GENERAL CLAUSES ACT (X OF 1897), S. 6— Principles —Applicability — Later Order removing prohibitions contravened under earlier Newspaper Control Order—Contravention if ceases to be offence ... 295

GOVERNMENT OF INDIA ACT (1935), Ss. 49 (2) and 124 (4)—Construction—Scope and effect—Mode of dealing with matters which could be dealt with by the governor under r. 26 of Defence of India Rules—"Executive"—Meaning—Home Minister status of—Routine orders of detention—Validity (P.C.) ... 325

———S. 59 (2)—Jurisdiction of High Court to investigate the validity of orders of detention under r. 26 of Defence of India Rules (P.C.) ... 325

———S. 240 (1) and (3) and Civil Services (Classification, Control and Appeal) Rules, R. 55—Dismissal of member of the Indian Civil Service—Secretary of State for India, if a competent authority—Scope of the power of dismissal—Limitations on such power—Remedy of the dismissed servant—Proper relief (F.C.) ... 270

GUARDIANS AND WARDS ACT (VIII OF 1890), S. 25—Lawful guardian's right to custody of children—Limits—Welfare of minors of primary importance ... 463

HINDU LAW—Adoption—Adoption by widower—Validity and effect—Divesting—Right of adopted son to the stridhanam properties of adoptive father's deceased wife which had reverted to her parent's family by custom among Nattukottai Chettiars. 337

———Adoption—Rule against adoption of boy between whose natural mother and the adoptive father a legal marriage is not possible—Overridden by custom in the Madras Presidency—Natural mother and adoptive father belonging to the same gotra and cousins many times removed—Adoption lawful by reason of custom ... 228

———Debts—Pious obligation of son—Liability to discharge surety debts of father (P.C.) ... 160

———Joint family — Agreement for management of the family affairs and division of the income of agricultural lands—If sufficient to indicate a severance in status—Earlier division of moveables and outstandings—Effect ... 504

———Joint family—Partition—Essentials—Conduct of family and attendant circumstances—Sufficiency to prove separation (P.C.) ... 182

———Minor—Decree against—Suit to set aside on the ground of gross negligence of guardian—Guardian's duties in defending suit ... 86

———Minor—*De facto* guardian—Powers of—Cannot sexecute promissory note in the name of the minor even in respect of borrowings for necessary purpose so as to bind minor's estate—Sale of minor's property in discharge of debt due on such promissory note—Nullity—Such promissory note cannot operate as acknowledgment of antecedent debts so as to save limitation (F.B.) ... 375

———Minor—*De facto* guardian—Sale of minor's property without any valuable con-

HINDU LAW—*Contd.*
sideration to support it—Setting aside—Liability of alienee to account for mesne profits—Limits ... 508

———Reversioner—Suit to avoid alienation by widow—Plaintiffs not being nearest reversioners—Grant of relief— Permissibility ... 442

———Settlement deed in favour of wife—Provision that settlor was to enjoy the property in the event of the wife pre-deceasing the settlor and after their lifetime son to be adopted to enjoy the property in his capacity as son—Adopted son's right—Nature of ... 453

———Widow—Alienation by one co-widow for necessity—Purchase of the same property in execution by the holder of a simple money decree against the widow as representing her husband's estate—If he can question the validity of the alienation—Alienation made during pendency of appeal in a suit between the co-widows—Plea of *lis pendens* if available to the money decree-holder purchaser—Adverse possession of alienee—Not interrupted by application for possession by the purchaser in execution which was subsequently dismissed ... 173

———Widow—Declaration of her right to a sum in Court as her share—Application to draw the amount—Demand of security—Not proper in the absence of justifying circumstances ... 409

———Widow—Suit for recovery of property—Compromise giving her some of the properties claimed—Nature of estate taken ... 266

———Widow—Transfer of property in favour of daughter and grand-daughter—Maintenance deed executed in return—Property partitioned between donees' heirs—Person taking benefit under—Alienations effected by—Succession to widow as reversionary heir—Suit for recovery of property ignoring previous transfers by the other heir—Applicability of principles of estoppel or election ... 208

HOARDING AND PROFITEERING PREVENTION ORDINANCE (XXXV OF 1943), S. 13 (3)—Power to order confiscation—Limits—Refusal to sell certain goods on the ground that no stock was available—Refusal to sell extends to whole stock which can be ordered to be confiscated ... 458

INAM—Channel passing through inam village—Reservation of right in favour of Government—Burden of proof—Lands along channel being dry—Inference as to right of inamdar ... 250

———Grant of shrotriem inam—Nature of—Its character, if could be changed by title deed granted by the Inam Commission subsequently—Evidentiary value of entry in the Inam Register—Confirmation of grant for a period of lives only—Grant, if cannot be of full proprietary rights—Inclusion of poromboke in the inam—Effect—Question of law (P.C.) ... 352

INCOME-TAX—Deduction—Trading loss—Share of a bad debt obtained by a partner on dissolution of his partnership with his brother—Such share, valued at a nominal figure and treated as an asset of a new firm started by him along with his sons—Right of new firm to claim deduction of the sum, representing face value of the share of the bad debt as a trading loss ... 118

INCOME-TAX ACT (XI OF 1922), S. 4-A (*b*)—Residence in British India—Test—Partnership to acquire and work rubber plantation in Malacca—Provision for control of business by two of the partners in rotation—One of the controlling partners residing in British India during the accounting period—Evidence of consultation of that partner by his agent at Malacca in reference to this business—Inference ... 93

———S. 16 (1) (*c*) inserted by Act (VII of 1939)—Applicability to income from revocable settlements made by the assessee long before the Amending Act came into force—Such income, though accrued before the amendment came into operation, can be deemed to be the income of the assessee as contemplated in the section (P.C.) ... 11

———(as amended by Act VII of 1939), S. 25 (3)—"Discontinued"— Meaning —Object and effect of the amendment (P.C.) ... 231

———S. 66 (1)—Question as to proper effect of a proved fact—Question of law—Power of Court to correct wrong conclusions drawn from admitted or proved facts ... 93

INSURANCE ACT (IV OF 1938), Ss. 2 (10), 40 (1) and 44—Agents and sub-agents of insurance company—Position of—Notice of termination of agency—When operates—S. 44—Rights under—If available to contract of agency prior to date of Act—Right to damages—S. 44 proviso—Scope (P.C.). 496

JUDICIAL OFFICERS PROTECTION ACT (XVIII OF 1850)—Sale officer executing award under Madras Co-operative Societies Act—Acts judicially and is entitled to protection of Act (XVIII of 1850) ... 180

JURISDICTION—Value of suit for purposes of—Subject-matter of plaint relating to things which have a real money value. 538

LAND ACQUISITION ACT (I OF 1894), S. 6 (1), proviso and (3)—Declaration under S. 6 (1) final and cannot be questioned in a Court of law—Contribution by Government of only one anna to the compensation awarded—Sufficient compliance with the provisions of the proviso to S. 6 (1) (F.B.) ... 237

———S. 18—Reference by Collector—Question of limitation also mentioned—Power of Court to decide—Collector making reference as judicial officer ... 559

LANDLORD AND TENANT—Denial of landlord's title in the reply to the landlord's notice—Works out a forfeiture of tenancy ... 416

LEGAL PRACTITIONER—Pleader—When can be permitted to appear against

LEGAL PRACTITIONER—*Contd.*
his former client or his representatives in interest in the same suit ... 187

LIMITATION—Delivery of symbolical possession—Interruption of possession—Person denying title through judgment-debtor—Saving of limitation ... 205

LIMITATION ACT (IX OF 1908), S. 10 and Arts. 62, 89, 120 and 123—Applicability—Sale of estate of deceased Mahomedan—Proceeds entrusted to defendant—One heir claiming his share—Starting point of limitation—Knowledge whether material—Express trust whether created ... 422

———S. 20—Amendment in 1942 long after suit—Cannot revive barred debt ... 405

———S. 20—Payment by cheque—Whether payment in writing within the meaning of the section ... 202

———Art. 31—Suit against railway company for compensation for loss of goods consigned for transit—Starting point of limitation ... 448

———Art. 85—Applicability—Banker and customer—Current account with overdraft facilities—If "mutual, open and current" account ... 120

———Art. 89—Power of attorney in general terms to collect an outstanding—Collection by agent—Amount not paid to principal—Suit for recovery—Starting point of limitation ... 484

———Arts. 140 and 141—Applicability—*See* WILL—CONSTRUCTION (P.C.) ... 393

———Arts. 181 and 182—Compromise maintainance decree in 1922—Suit for reduction of claim—Modification of original decree in 1937—Appeal—Restoration of original claim in 1940—Execution application filed in the interval dismissed in 1937 as not pressed—Fresh execution application in 1941 in respect of period between 1935 and 1941—Bar of limitation—Plea of exclusion of time and revival of prior application—Maintainability ... 444

———Art. 182—Appellate order in execution—Starting point of execution ... 197

———Art. 182 (5)—Appeal against dismissal of execution application—Is an application in accordance with law to the proper Court to take a step-in-aid of execution—Appellate Court, the only Court which can execute the decree—Computation of time to be from the date of the final order of the appellate Court—Step-in-aid of execution, if can be only in a pending execution and in furtherance of it (P.C.) ... 224

———Art. 182 (5)—Applications in accordance with law—Decree-holder not carrying out directions of Court for effectual execution—Applications, none the less steps-in-aid of execution ... 152

———Art. 182 (5)—Execution petition "closed"—Continuance of attachment—Fresh application for execution filed beyond six years—Whether can be treated as continuation of previous application ... 456

LIMITATION ACT (1908)—*Contd.*
———Art. 182 (5)—Execution petition filed with wrong number of the suit—Application not in accordance with law—Prayer for issue of notice under O. 21, r. 22—Step-in-aid of execution ... 427

MADRAS AGRICULTURISTS' RELIEF ACT (IV OF 1938), S. 3—Right to relief under the Act—Estate of a deceased person ... 410

———Ss. 8 and 9—Renewal of promissory note—Amount due under previous note not scaled down—Suit on later note—Right of debtor to relief ... 565

———S. 8—Set-off of another debt due from the debtor to the creditor—Is "payment" for purposes of the Act ... 429

———S. 8, Expl.—Two debts due by same debtors to two different creditors—Discharge by joint mortgage executed in favour of the two creditors—Mortgage if can be scaled down as renewal of separate debts to each of the joint mortgagees ... 411

———S. 19—Compromise decrees—Scaling down—Principles ... 135

———S. 19—Right of appeal against an order under—Retrospective nature of amending Act (XV of 1943)—C. P. Code, O. 21, r. 89—Deposit under—Amount subject to modification ... 255

———S. 20, Proviso—Applicability—Court executing decree also the Court which passed it—S. 20 not inapplicable and if stay is ordered scaling down application must be made within sixty days—Stay obtained by junior member of Hindu joint family—Manager cannot apply beyond sixty days of stay order for scaling down ... 535

———S. 20, Proviso—"Rejected"—Meaning ... 374

MADRAS CITY TENANTS' PROTECTION ACT (III OF 1922)—Applicability—Date of creation of tenancy—Physical continuity after the Act came into force of tenancy commenced before the Act—Rent deed executed for the first time after Act came into force on the same rent and on almost the same terms as before—Tenancy originated when tenant entered into occupation ... 190

MADRAS CIVIL COURTS ACT (III OF 1873), S. 13—Appeal properly lying to District Court—Court closed for vacation—Appeal preferred to High Court—Maintainability—Need for amending Act—Letters Patent, cl. 16 ... 131

MADRAS CO-OPERATIVE SOCIETIES ACT (VI OF 1932)—Sale officer executing award under, postponing the sale—Acts judicially and is entitled to the protection of Judicial Officers Protection Act (XVIII of 1850) ... 180

———Ss. 25 and 47—Society going into liquidation—Levy of contribution by liquidator more than two years after the date of the winding up against member who had ceased to be a member prior to liquidation—S. 25, not a bar to such a levy ... 263

MAD. CO-OP. SOC. ACT (1932)—*Contd.*

——Ss. 47 and 48—Society in liquidation—Order against member—Execution sale—Suit in Civil Court to avoid—Maintainability ... 112

——S. 51—Mortgage by member to Society—Proceedings for enforcing—Alienee from mortgagor is a proper party to—Power of Registrar or arbitrator appointed by him to pass a decree for sale of the property—Alienee who was party to proceedings—Cannot question the decree in execution or by separate suit—Bye-law of Society providing for execution by Civil Court only—Act providing for execution through department—Effect ... 2

MADRAS DEBT CONCILIATION ACT (XI OF 1936), Ss. 10 and 19 (iv)—Suit on promissory note—Earlier proceedings before Debt Conciliation Board—Statement submitted by creditor beyond the time allowed but accepted by the Board—Effect ... 66

——Ss. 10 (2) and 19 (*b*)—Discharge of debts under S. 10 (2)—Statutory and not dependant on orders of the Board—Order of the Board under S. 10 (2) discharging a decree debt for non-production of accounts by the creditor concerned—Legality—If can be pleaded in bar of execution of that decree—Scope of the bar of execution contained in S. 19 (*b*) ... 517

——S. 10 (3)—'Civil Court' before which creditor whose debt has been declared discharged under S. 10 (1) may file application for revival of his debt—Should be one having pecuniary as well as territorial jurisdiction as regards the debt sought to be revived ... 204

——S. 14—Mortgage—Agreement between parties—Provision for sale in case of default of payment within time fixed—Sale and purchase of property—Mortgagor depositing in Court amount due before sale confirmation—Whether O. 34, r. 5, C. P. Code, applied ... 117

——S. 27 (1)—Execution petition—Limitation—Period occupied before Debt Conciliation Board in respect of the debt should be excluded ... 402

MADRAS DISTRICT MUNICIPALITIES ACT (V OF 1920), Ss. 3 (17), 81 (4) (*b*) and 86—Levy of property tax on owner of agricultural land—Distinction between landholder having interest in land and person cultivating land—Levy on owner justified ... 244

——S. 81, cls. (3) and (4)—Construction—Land covered by casuarina plantation—If "agricultural land" for purposes of assessment to property tax ... 315

——S. 83 (1) (*c*) (as amended by Madras Act XXI of 1939)—House leased to Municipal Council for the purpose of a school—Assessment to property tax after Amending Act XXI of 1939—Legality ... 425

——S. 359 and Penal Code (XLV of 1860), S. 323—Obstruction to municipal servant in the discharge of his duties and causing of hurt to him in the course of the obstruction—Separate charges under S. 359, District Municipalities Act and S. 323 of the Penal Code—Legality—Conviction on both—Propriety ... 541

MADRAS ESSENTIAL ARTICLES RESTRICTED ACQUISITION ORDER (1943), S. 3 (1)—Acquisition prior to order coming into force—Transportation into a locality after the order had come into force there—No offence made out under S. 3 (1) ... 539

MADRAS ESTATES LAND (AMENDMENT) ACT (II OF 1945), Ss. 2 and 4—Amendment contained in S. 2 (1) not only retrospective but also expropriatory—Proper construction of S. 4—Its meaning and effect ... 207

MADRAS ESTATES LAND ACT (I OF 1908), S. 3 (2) (*b*) and (*e*) and S. 3 (16) and Amendment Act (II of 1945)—Mokhasa lands—Suit for recovery of rent and for ejectment—Civil Court's jurisdiction ... 214

——Ss. 3 (10) (*b*) (*iv*), Proviso 6, 55, 185-A and 185-B—Private land—Purchase of land by landholder for arrears of rent and cash paid—Acquisition of kudivaram—Tenant being in possession for long period—Inference—Meaning of "retention of kudivaram" ... 148

——Ss. 3 (11) (*a*) and 111—Rent—Dues for the enjoyment of backyards of the houses of ryots—Proceedings under S. 111 for their recovery—Maintainability ... 312

——S. 3 (16)—Padugai land—If "ryoti land"—Suit to recover possession of such land from purchaser of crops only on such land from lessee—Maintainability in Civil Court ... 380

——S. 25 (as amended by the Amending Act VIII of 1934)—Premium on "old waste"—Direction for payment in compromise decree passed after the Amending Act of 1934 had come into force—Executability ... 515

——Ss. 145 and 146—Insolvency of ryot—Holding vested in Official Assignee in 1931—Holding brought to sale under S. 112, Madras Estates Land Act, without notice to Official Assignee—S. 146 does not apply—Duty of landholder to seek out a transferee or a person on whom the holding had vested ... 158

——S. 145 (2)—Requirements if not complied with in respect of a conveyance—Registration if can be refused ... 133

——Ss. 163 and 77—Sale for arrears of rent—Amount accruing between dates of sale and delivery of holding—If could be recovered as rent ... 469

MADRAS GAMING ACT (III OF 1930), Ss. 5 and 6—Warrant issued under S. 5—Contents—Presumption under S. 6, depends on proper compliance with terms of S. 5—Absence of proof of house being used for profit or gain—Convictions—Sustainability ... 537

——Ss. 9 and 6—Evidence negativing element of profit or gain to owner of the house concerned—Conviction under S. 9, not

MAD. GAMING ACT (1930)—*Contd.* warranted—Scope and effect of S. 6—Nature of the evidence afforded by the instruments of gaming and the persons found in a place searched under S. 5 ... 521

MADRAS HINDU RELIGIOUS ENDOWMENTS ACT (II OF 1927), Ss. 9 (11) and 69—*Swastivachakam* and *vedaparayanam* service grant—Whether constitutes endowment—Liability to contribution ... 220

———S. 73—Suit under—Scheme—Court has no power to settle ... 164

MADRAS HOUSE RENT CONTROL ORDER (1941), Cls. 1 (3) and 6 (*c*)—Extension of order to whole of the Presidency—No retrospective effect to be given—Decree for arrears of agreed rent of dwelling house in the mofussil—Fixing of fair rent subsequent to decree—If and how far can supersede amount decreed ... 137

MADRAS LOCAL BOARDS ACT (XIV OF 1920, as amended), Ss. 3, 80, 81 and 88—Cess apportionment between landholder, sub-landholder and tenants—Payment by sub-landholder to avert attachment—Reimbursement—Suit for recovery of arrears of *poruppu*—Payment of cess as item of deduction ... 177

MADRAS PREVENTION OF ADULTERATION ACT (III OF 1918), S. 6-A (2)—Purchase of butter for use—Butter not used but sold to a dealer with a warranty that butter was pure and unadulterated—Vendor having no reason to believe that these statements and descriptions were true—Guilty under S. 6-A (2) ... 130

MADRAS PREVENTION OF ADULTERATION RULES (1932), R. 28-B—Ingredient—Meaning—Ghee in which a sweetmeat is fried not an ingredient of the sweetmeat ... 366

MADRAS PUBLIC HEALTH ACT (III OF 1939), S. 142—Health Officer abusing and beating subordinate—Prosecution for—Sanction—Necessity ... 546

MADRAS TOWN PLANNING ACT (VII OF 1920), S. 34, proviso—Date of acquisition—Date of taking possession in pursuance of an award and not the date of the award ... 6

MADRAS TRAFFIC RULES, R. 39 (1) (*b*)—Riding on the carrier of a cycle pedalled by another—Offence ... 585

MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT (I OF 1900), S. 3—Person entering upon waste land of Government and bringing it under cultivation—Customary rent how computed ... 127

———Ss. 5 and 6—Tenants sub-leasing—Damage caused by sub-tenants—Claim for compensation for improvements by sub-tenant—Set off how far permissible—Balance remaining in favour of landlord—Right to get decree for it—'Melcharth'—Existence of—How far landlord deprived of his right to sue for ejectment ... 381

MALABAR TARWAD—Karnavan—Removal from office—Subsequent execution of puramkadam—Suit by melcharthdar for redeeming kanom—Validity of puramkadam whether can be gone into—Succeeding karnavan disowning transaction—Effect ... 96

MALABAR TENANCY ACT (XIV OF 1930), S. 14 (5)—Landlord requiring the land for his own cultivation—*Bona fides*—Assertion of landlord not sufficient—Paddy rent—Computation of value in money ... 13

———S. 17 (*c*)—Scope—Exemption from *kanamdar's* right to renewal of "dry lands" covered by the *kanam*—Is to be determined on the state of the lands at the date of application for renewal and not at date of the *kanam*—S. 3 (*d*)—"Dry land"—Test for deciding ... 464

———S. 20 (2)—Suit for eviction—Facts to be proved—Building of temporary structure on the surface of the earth and planting of trees that do not take deep root—No proof that land was permanently impaired ... 191

———S. 21—Suit by wrongly evicted tenant for restoration of the holding—It is not essential that all the tenants should join in the suit where there are joint tenants ... 78

———S. 33—Marupat in respect of paramba and farm house—Assignment of lease—Enjoyment of house site for over ten years—Right under S. 33 to purchase right of landlord—Fact that house was put up recently, whether material ... 471

———S. 51 (2)—Applicability—Rent payable in kind under a marupat—Commutation rate ... 351

MARUMAKKATTAYAM ACT (XXII OF 1933), S. 19—'Children'—Means legitimate children—Children of ordinary Marumakkattayam marriage—Right to inherit the self-acquired property of their father... 15

MASTER AND SERVANT—Negligence of servant—Liability of master—Amount of damages—Finding of trial Court—Interference in appeal (P.C.) ... 257

MORTGAGE—Co-sharer creating two mortgages over his share in favour of different persons—Separate suits by each mortgagee without impleading the other—Decrees—Each mortgagee purchasing the share in execution of his own decree and obtaining symbolical possession—Suit for partition by second mortgagee—Relief that could be given ... 1

———Suit on—Limitation—Acknowledgment by mortgagor subsequent to transfer of his interest in one of the mortgaged properties—Transferee not bound by acknowledgment—No saving of limitation ... 556

———Two mortgages—Sale in execution of prior mortgage—Setting aside—Suit to enforce later mortgage—Money advanced to set aside sale—Equity in favour of person advancing—C. P. Code, O. 21, R. 89 ... 305

MORTGAGE—*Contd.*

———Usufructuary mortgage—Period fixed for redemption—Failure of mortgagee to advance the full amount of mortgage money—Does not entitle mortgagor to sue for redemption before expiry of period fixed for redemption ... 7

MOTOR VEHICLES ACT (IV OF 1939), Ss. 2 (8) and 42 (1)—Car used occasionally to carry bundles of newspapers to railway station—Permit for 'goods vehicle' not obtained—Offence ... 68

MOTOR VEHICLES RULES (1938), R. 220—Offence under—Stopping of a bus in front of a hotel to pick up passengers from there ... 574

MUSSALMAN WAKF ACT (XLII OF 1923), S. 3—District Judge calling upon mutavalli to file statements regarding the finances of the trust—Action *suo motu*—District Judge has no jurisdiction ... 269

NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), Ss. 26 and 27—Suit on a promissory note—Executant described as a partner in a firm—Whether other partners can be made liable ... 13

NEWSPAPER CONTROL ORDER (1942), cl. 5 (1)—Publishing newspaper with excessive number of pages in violation of the order—Newspaper Control Order of 1944 superseding that of 1942 removing the prohibitions contravened—Effect—Publication if ceases to be offence—General Clauses Act, S. 6—Principles of—Applicability ... 295

NEWSPRINT CONTROL ORDER (1941), cl. 3 (6)—Use of paper other than newsprint for production of annual supplement to a weekly—How far an offence ... 128

OATHS ACT (X OF 1873), S. 13—Applicability—Section, if confined to cases where the omission to administer the oath occurs *per incuriam*—Reception of evidence of unsworn evidence from a child—Corroboration, if necessary for acting upon it—Rule of law and rule of prudence (P.C.) ... 493

PENAL CODE (XLV OF 1860), S. 34—Construction—Scope and applicability—Common intention—Meaning (P.C.)... 144

———S. 239—Gist of offence under ... 200

———S. 323—Separate charges under S. 323, Penal Code and S. 359, Madras District Municipalities Act—Legality—Conviction on both—Propriety ... 541

———S. 499, exception 9—Object and scope of—Club cases—Good faith and honest freedom of expression—Written statement of accused—Value to be attached and consideration to be shown—Investigation of evidence in revision—Justifying circumstances ... 435

———S. 494—Bigamy—Gist of. *See* CHRISTIAN MARRIAGE ACT, S. 88 ... 80

PLEADINGS—Amendment of plaint—New cause of action sought to be introduced—Alteration in nature and complexion of suit—Suit for possession of partitioned property—Alternative case on footing of parties being joint—Whether can be brought in by amendment ... 542

PRACTICE—Mistake as to proper remedy—Leave to amend (F.C.) ... 270

———Suit for specific performance of agreement to execute mortgage to secure moneys lent—Mortgage decree—If can be passed along with decree for specific performance ... 383

———Undervaluation resulting in trial in a Court of lower pecuniary jurisdiction—Objection to jurisdiction—Sustainability on appeal—Suits Valuation Act (VII of 1887), S. 11 (2) ... 525

PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), S. 17—Suit to avoid alienations of insolvent—Leave of Insolvency Court—Necessity ... 318

PRINCIPAL AND AGENT—Authority to sell—Construction—Scope and binding nature—Difference between authority to sell and authority to find a purchaser ... 363

PRIVY COUNCIL—Interference in criminal cases. *See* CRIMINAL TRIAL.

PROVINCIAL INSOLVENCY ACT (V OF 1920)—Alienation of movables by insolvent—Avoidance by Official Receiver—Subsequent application for mesne profits—Period for which profits may be allowed ... 557

———S. 4—Hindu father declared insolvent—Purchaser from Official Receiver obstructed by the sons—Application for delivery of possession after removal of obstruction—Decision by Court that the properties were self-acquired and sons referred to separate suit to establish rights, if any—Decision binding—Title to the property cannot be re-agitated ... 384

———S. 68—Person aggrieved—Creditor applying to set aside sale of insolvent's property—No proof of his debt prior to date of his application—Inclusion of his name as supplemental creditor prior to the date of the order thereon—Maintainability of the application—Inherent power of Court to rectify receiver's mistakes or modify his orders ... 553

PUBLIC POLICY—Agreement opposed to. *See* CONTRACT ACT, S. 23 ... 468

PUBLIC WAY—Newly erected mosque on it—Agreement at time of erecting mosque by all the then Muhammadan residents of the village not to object to processions by Hindus with music opposite the mosque—Muhammadan community how far bound ... 200

RAILWAYS ACT (IX OF 1890), Ss. 11 (3) (*b*) and 12—Applicability—Culvert below railway line to take off overflow water from a tank—Order of Provincial Government for widening culvert—Work carried out by Railway Company—Tank and culvert within Municipal limits—Order of Provincial Government if *ultra vires*—Compensation from Municipality—Right of Railway Company to claim—Contract Act (IX of 1872), S. 70—Applicability ... 155

RAILWAYS ACT (1890)—*Contd.*
———S. 80—Suit for compensation for loss of goods carried over two Railways—Cause of action—Company which can be proceeded against ... 448

REGISTRATION ACT (XVI OF 1908), S. 47—Effect of registration on the date of operation of the document registered—Subsequent notice threatening to ignore the document—Efficacy of the document not destroyed—C. P. Code (V of 1908), O. 41, R. 27 (1) (*b*)— Applicability— Conditions for (P.C.) ... 519

———Ss. 73, 74 and 75—Presentation of conveyance—Non-appearance of vendor—Requirements of S. 145 (2), Madras Estates Land Act, not complied with—Refusal to register—Legality ... 133

SALE OF GOODS ACT (III OF 1930), S. 42—Acceptance of goods—What would amount to—Order for supply of hose similar in quality to a prior supply—Delivery made in seven instalments—Purchaser intimated at each delivery that goods would not be taken back unless informed of non-approval within three days of delivery—Goods supplied in the first four instalments paid for—Subsequent demand by purchaser for replacement of goods supplied on the ground of defective quality—Suit to recover money paid as price for the goods—Maintainability—Reasonable time for rejection ... 418

SPECIFIC PERFORMANCE—Right to —Sale—Lease back to vendee with separate agreement to reconvey to him—Construction —Waiver of default in payment of rent—Acceptance of rent does not operate as waiver of rights under the agreement to reconvey—Non-fulfilment of conditions of the agreement—Right to demand specific performance of agreement to reconvey does not arise ... 371

SPECIFIC RELIEF ACT (I OF 1877), S. 42—Suit by Panchayat Board for declaration that a latrine was vested in it and for injunction restraining defendant from interfering with the work of repair by the Board—If site must be found to have vested in the Board for the grant of relief—Lawful possession of Board—Sufficiency ... 176

STAMP ACT (II OF 1899), Ss. 29 (*g*) and 44—Documents of partition of properties between two brothers—Stamp duties not paid—Proceedings against them—Common default—One of the brothers paying under compulsion—Not entitled to recover from the other the half share of duty paid ... 253

SUCCESSION ACT (XXXIX OF 1925), S. 361—Right of unsatisfied creditor of testator to proceed against property in the hands of his executor—Limits—Executor also legatee of that property in trust for a charity—Decree after impleading executor as legal representative of testator—Execution against property devised to charity—Objections to—Proper procedure—C. P. Code (V of 1908), S. 47 and O. 21, R. 63—Scope ... 525

SUITS VALUATION ACT (VII OF 1887), S. 11 (2)—Objection to jurisdiction on the ground of under-valuation—Sustainability on appeal ... 525

TORTS—Liability of a person changing the course of a channel for damage caused to a neighbouring owner—Change in the course of the channel not the primary or the proximate cause of the damage—Damage due to heavy rainfall inevitable even if there had been no change—Effect ... 245

———Malicious house search—Action for—Maintainability—Damages—Principles for assessment—Exemplary damages—If can be ordered—Existence of long standing strained relations between parties—Is a ground for award of exemplary damages and not for refusing it—Quantum of damages—Power of High Court to interfere with in second appeal ... 461

TRANSFER OF PROPERTY ACT (IV OF 1882), S. 43—Applicability—Tests ... 478

———S. 52—Suit for maintenance and for charge—Amendment of plaint—Inclusion of additional items of property in the claim —Death of the defendant beween the date of the application for amendment and of its being ordered—Transfer of the additional items by his legal representative prior to his being brought on record—Transfer affected by *lis pendens* ... 72

———Ss. 54 and 55 (4) (*b*)—Relinquishment by one member of his share in the family property in favour of another member under a deed of release—Execution of promissory note for the consideration amount —Assignment of pronote to third party—Suit on pronote and decree—Non-realization —Decree assigned to original promisee—Suit by latter to recover the amount as the charge of an unpaid vendor—Release, really a sale—Charge of the unpaid vendor not put an end to by the suit on the pronote and the decree therein ... 17

———S. 56—Right of marshalling—Purchaser undertaking to relieve certain items of mortgaged property from the encumbrance—Failure to do so—Right to demand item sold to him being sold last ... 412

———S. 68 (1) (*c*)—Principle of—Cannot be availed of by a charge holder in execution proceedings without resorting to a suit even where the security is impaired (P.C.) ... 160

———Ss. 100 and 52—Words 'by operation of law' in S. 100 include charge created by decree of Court—Maintenance decree—Sale in execution—Right of mortgagee subsequent to decree to redeem and pay off the charge decree—Rights of auction purchaser ... 388

———S. 107—Licence for mining operations—Registration not necessary ... 400

TRUST—Bank draft taken in name of another——Beneficiary notifying bank before encashment—Right of bank to set off. *See* BANKER AND CUSTOMER ... 100

TRUST—*Contd.*

———Charitable endowment—Choultry—Foundation by owner of impartible estate—Situation outside estate and maintenance out of separate endowment—Trusteeship in Zamindar for the time being—Transfer of estate—Trusteeship cannot pass as annexe to the impartible estate ... 264

———Creation—Essentials—Mere credit entry without setting apart corresponding amounts—Not sufficient to create a trust fund—Unfinished building devised to charity with directions to feed the poor in it after completing the construction—Validity of devise ... 525

———Endowment in favour of temple—Essentials for constitution of—Mere book entry crediting amounts in donor's books—Not sufficient ... 164

———Temple—Suit against *de facto* trustee—Decree passed—Binding nature ... 399

U. P. ENCUMBERED ESTATES ACT (XXV OF 1934), S. 14 (5)—Construction and scope—Mortgage contract resulting from negotiations—If one made in the course of the "transaction"—Contract to treat accumulated interest as principal on 31st December, 1916—Can be given effect to (P.C.) ... 75

WILL—Construction—Hindu testator making provision for father's sister and his own sister "in case there is no male or female issue and wife"—Testator dying leaving two widows and some of the legatees and their children—Suit by the son of the testator's father's sister and his transferees to recover the property in the possession of sons of the testator's sister—Limitation—Starting point—Limitation Act (IX of 1908), Arts. 140 and 141 (P.C.) ... 393

WILL—*Contd.*

———Probate—Delay in application for—Room for suspicion—Effect of proper proof of execution and attestation—Execution of will and deed of authority to adopt on the same day—No improbability is involved—Execution and attestation, finding as to—Question of fact (P.C.) ... 46

———Will by a Christian—Clause "I earned all the properties and after my lifetime my wife and foster-daughter should get those properties"—Schedule to will describing the properties—Construction—Properties at time of death and not as on date of execution of will disposed of—Bequest is to wife and foster daughter jointly ... 194

WORKMEN'S COMPENSATION ACT (VIII OF 1923), Ss. 19 (2) and 12 (2)—Principal paying compensation claiming right to indemnity from contractor—Jurisdiction of Civil Court ... 522